

3-28-2012

Alpine Village Co. v. City of McCall Clerk's Record v. 1 Dckt. 39580

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SUPREME COURT NO. .

**SUPREME COURT
OF THE
STATE OF IDAHO**

LAW OFFICE K

COPY

ALPINE VILLAGE COMPANY

PLAINTIFF and

APPELLANT

VS.

CITY OF MCCALL

DEFENDANT and

RESPONDENT

*Appealed from the District Court of the Fourth Judicial District of the
State of Idaho, in and for Valley County.*

Honorable Michael R. McLaughlin, District Judge, Presiding

Steven J. Millemann

Attorney for Appellant

Christopher H. Meyer

Attorney for Respondent

Filed this 26th day of March, 2012

ARCHIE N. BANBURY

Clerk

By: 8 2012

Deputy

IN THE SUPREME COURT OF THE STATE OF IDAHO

ALPINE VILLAGE COMPANY,)	
)	SUPREME COURT NO. 39580-2012
Plaintiff/Appellant,)	
)	
-vs-)	
)	District Court No.CV-2010-519-C
CITY OF MCCALL,)	
)	
Defendant/Respondent.)	
_____)	

CLERK’S RECORD ON APPEAL

Appeal from the District Court of the Fourth Judicial District of the
State of Idaho, in and for the County of Valley.

Honorable Michael R. McLaughlin, District Judge
Presiding

STEVEN J. MILLEMANN
MILLEMANN, PITTENGER, MCMAHAN
& PEMBERTON, LLC
P.O. BOX 1066
MCCALL, ID 83638

ATTORNEY FOR APPELLATE

CHRISTOPHER H. MEYER
GIVENS PURSLEY LLC
P. O. BOX 2720
BOISE, ID 83701

ATTORNEY FOR RESPONDENT

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STEVEN J. MILLEMANN, ISB NO. 2601
GREGORY C. PITTENGER, ISB NO. 1828
MILLEMANN, PITTENGER, McMAHAN & PEMBERTON, LLP
ATTORNEYS AT LAW
706 NORTH FIRST STREET
POST OFFICE BOX 1066
McCALL, IDAHO 83638
TELEPHONE: (208) 634-7641
FACSIMILE: (208) 634-4516
EMAIL: sjm@mpmplaw.com
gcp@mpmplaw.com

Attorneys for Plaintiff

ARCHIE N. BANBURY, CLERK
By [Signature] Deputy
DEC 10 2010
Case No. _____ Inst. No. _____
Filed _____ A.M. 3:47 P.M.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

ALPINE VILLAGE COMPANY,
an Idaho Corporation,
Plaintiff,

v.

CITY OF MCCALL,
a municipal corporation,
Defendant.

CASE NO. CY-2010-519C

VERIFIED COMPLAINT

Category: A
Filing Fee: \$88.00

COMES NOW the above named Plaintiff, Alpine Village Company, an Idaho Corporation and for its cause of action against the City of McCall (hereinafter "City or "McCall"), complains and alleges as follows:

PARTIES

1. Plaintiff is an Idaho corporation which at all times material hereto was the developer and owner of the Alpine Village Planned Unit Development (hereinafter "Alpine Village") which is located in McCall, Valley County, Idaho. Plaintiff is also the owner of the Timbers Condominiums (the "Timbers") which is located in McCall, Valley County, Idaho.
2. Defendant City of McCall is a municipal corporation of the State of Idaho.

JURISDICTION AND VENUE

3. Jurisdiction and venue are proper in this Court as Defendant is situated in Valley County and Plaintiff is seeking damages in excess of Ten Thousand Dollars (\$10,000).

NATURE OF ACTION

4. This is a civil action seeking damages for actions of the City which constitute an unlawful taking of Plaintiff's property in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

FACTS

5. Plaintiff acquired property located in downtown McCall for the purpose of developing a mixed use development. Plaintiff's said property is the site of Alpine Village.

6. On February 23, 2006, McCall adopted Ordinance No. 819 (hereinafter "Ordinance 819" or "Inclusionary Housing Ordinance").

7. Ordinance 819 required that twenty (20) percent of the lots and houses in all new residential subdivisions, including condominium projects, be permanently restricted as community housing units to be affordable to City of McCall households with incomes in certain defined categories. A true and accurate copy of Ordinance 819 is attached hereto as "**Exhibit A**".

8. Ordinance 819 required any applicant seeking the City's approval of a new residential subdivision or condominium project to submit an Inclusionary Housing Plan (a.k.a. Community Housing Plan) with the initial subdivision application. The Plan was required to demonstrate the applicant's proposed method of providing the community housing which was required by Ordinance 819.

9. Ordinance 819 provided four ways by which an applicant could satisfy the community housing requirements of the Ordinance: 1) construct the community housing units on the site of the proposed subdivision; 2) construct the community housing units off-site from the subdivision; 3) convey land to the City equal in value to the total amount of the required number of community housing units, or 4) pay a fee to the city in lieu of providing either finished units or land. Options 1 and 2 required that the units be permanently deed restricted both as to price and the allowable income levels of buyers and owners.

10. On June 20, 2006, Plaintiff submitted the applications to the City which were required by the McCall City Code for preliminary approval of the Alpine Village project. These

included applications for Preliminary Plat Approval, for Planned Unit Development Preliminary Plan Approval, for a Conditional Use Permit, for Scenic Route Approval and for Amendment of the McCall Zoning Map (hereinafter the "Preliminary Applications"). The project is a multi-phase planned unit development with a mix of residential, retail and commercial condominium units. As required by Ordinance 819, a Community Housing Plan was submitted with the Preliminary Applications. The Preliminary Applications were accepted by the City, which then commenced its review and public hearing process.

11. On September 22, 2006, a lawsuit was filed by the Mountain Central Board of Realtors, Inc., against the City of McCall, (Valley County Case No. CV-2006-490C) seeking to overturn Ordinance 819. The filing of the lawsuit did not interrupt or impact the City's processing of the Alpine Village Preliminary Applications.

12. On October 3, 2006, the McCall Planning and Zoning Commission recommended approval of all of the Alpine Village Preliminary Applications to the McCall City Council, conditioned among other things, on Plaintiff reaching agreement with the City Council on the Plaintiff's method of compliance with Ordinance 819 and reducing such agreement to a recorded "Development Agreement".

13. On December 13, 2006, the McCall City Council approved all of the Alpine Village Preliminary Applications, conditioned on Plaintiff's submittal of a Community Housing Plan, as part of a Development Agreement, demonstrating compliance with Ordinance 819, prior to final plat approval.

14. In January, 2007, Plaintiff entered into a purchase agreement to acquire the Timbers. Plaintiff agreed to purchase the Timbers solely so that Plaintiff could supply the seventeen (17) off-site community housing units which would be required to satisfy the Alpine Village community housing requirements which were imposed by Ordinance 819. Plaintiff's agreement to purchase the Timbers was contingent upon Plaintiff receiving approval from the McCall City Council for the use of the Timbers units to satisfy the off-site community housing requirements for Alpine Village under Ordinance 819.

15. On March 22, 2007, the McCall City Council approved Plaintiff's Community Housing Plan for Alpine Village, which proposed to use the Timbers units as the seventeen (17) off site community housing units for Alpine Village. This approval, and the Ordinance itself,

required that the Timbers units be deed restricted as Community Housing Units, to be offered at restricted prices to income eligible buyers, all in accordance with the Ordinance.

16. Having received the aforesaid City Council approval for the use of the Timbers units as the off-site community housing units for Alpine Village, Plaintiff closed on its purchase of the Timbers on or about April 16, 2007.

17. Subsequent to its purchase of the Timbers, plaintiff improved the Timbers in order to comply with the City's conditions of approval and to make the units marketable as owned or rented community housing units.

18. On May 25, 2007, Plaintiff submitted its applications for Final Plat and Final PUD Plan approval for Phase 1 of Alpine Village (hereinafter the "Final Applications"). In satisfaction of the aforesaid City Council conditions of approval of the Preliminary Applications, Plaintiff submitted a proposed Development Agreement which incorporated the previously approved Community Housing Plan for Alpine Village, dedicating the seventeen (17) Timbers units as off-site community housing units for Alpine Village.

19. On August 23, 2007, the McCall City Council approved Plaintiff's Final Applications.

20. On December 13, 2007, Plaintiff and the City executed the Alpine Village Development Agreement. The Development Agreement confirmed Plaintiff's Community Housing Plan for Alpine Village, which was appended to the Development Agreement as Exhibit B. The Development Agreement was filed of record with the Office of Recorder of Valley County on January 28, 2008. A true and accurate copy of the Alpine Village Development Agreement is attached hereto as "**Exhibit B**".

21. On February 19, 2008, the District Court entered its Memorandum Decision and Order in Mountain Central Board of Realtors, Inc. v. City of McCall. The court held that Ordinance 819 was void and without force or effect. The City of McCall did not appeal the decision. A true and accurate copy of the Decision is attached hereto as "**Exhibit C**".

22. On April 24, 2008, by means of the adoption of Ordinance 856, the City repealed Ordinance 819. A true and accurate copy of Ordinance 856 is attached hereto as "**Exhibit D**".

23. On July 24, 2008, the City and Plaintiff executed the *First Amendment to Development Agreement, Alpine Village Planned Unit Development*, which was filed of record with the Office of Recorder of Valley County, Idaho on August 8, 2008. This Amendment

released Alpine Village from any community housing requirements. A true and accurate copy of the said First Amendment to Development Agreement is attached hereto as "**Exhibit E**".

CAUSE OF ACTION

24. Paragraphs 1 through 23 are realleged and hereby incorporated by reference.

25. Plaintiff purchased the Timbers Condominiums solely to comply with the mandatory requirements of Ordinance 819, which required that Plaintiff provide deed restricted and income restricted community housing units as a condition of proceeding with the development of Plaintiff's property. But for the Ordinance, Plaintiff would not have purchased the Timbers or incurred the costs associated with the purchase of the Timbers, the remodel and improvement of the Timbers and the continued ownership of the Timbers.

26. The City's requirement that Plaintiff comply with Ordinance 819 as a mandatory precondition to Plaintiff's development of its property constituted an unlawful taking of Plaintiff's property in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

27. As a direct and proximate result of the aforesaid taking, Plaintiff has been damaged in an amount in excess of \$10,000.00, the exact amount to be determined at trial.

28. On November 15, 2010, Plaintiff delivered to the City a written demand for payment of its damages incurred as a result of the aforesaid taking. The City has declined to compensate Plaintiff for any of its said damages.

ATTORNEY FEES

29. Plaintiff is entitled to recover its attorneys fees and costs incurred in pursuing this action, pursuant to Idaho Code Sections 12-117, 12-120 and 12-121, IRCP 54(e)(1) and the Fifth and Fourteenth Amendments to the United States Constitution.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff requests that this Court enter Judgment in favor of Plaintiff and against the City as follows:

1. Declaring that the City's application of Ordinance 819 to Plaintiff as aforesaid constituted a taking of Plaintiff's property in violation of the Fifth and Fourteenth Amendments to the United States Constitution;

2. Awarding Plaintiff its damages suffered as a result of the unlawful taking of its property, in an amount to be proven at trial;

3. Awarding Plaintiff its costs and attorney fees incurred in this action; and,
4. For such other relief as the Court may deem just and proper.

DATED this 10th day of December, 2010

MILLEMANN, PITTENGER, MCMAHAN
& PEMBERTON, LLP

By: 
STEVEN J. MILLEMANN

VERIFICATION

STATE OF IDAHO,)
)ss
County of Valley.)

I, Michael Hormaechea, being first duly sworn upon oath depose and say:

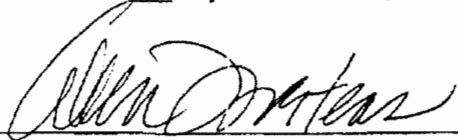
That I am the President of Alpine Village Company, Plaintiff in the above-entitled action; that I have read the foregoing Verified Complaint and acknowledge that the contents therein are true and correct to the best of my knowledge and belief.



Michael Hormaechea

SUBSCRIBED AND SWORN to before me this 9th day of December, 2010.





NOTARY PUBLIC FOR IDAHO
My Commission Expires: 12/1/2013

**EXHIBIT “A”
MCCALL
ORDINANCE NO. 819**

EXHIBIT "A"

ORDINANCE NO. 819

AN ORDINANCE OF THE CITY OF McCall, IDAHO AMENDING THE CITY OF McCall SUBDIVISION AND DEVELOPMENT REGULATIONS CODE, TITLE 9 TO REQUIRE ALL NEW SUBDIVISIONS TO INCLUDE A CERTAIN NUMBER OF COMMUNITY HOUSING UNITS TO BE AFFORDABLE TO THE CITY'S WORKFORCE, PROVIDE FOR A SEVERABILITY CLAUSE AND PROVIDE AN EFFECTIVE DATE.

WHEREAS, the Housing Component of the McCall Area Comprehensive Plan includes the following objectives:

- o Prepare for the housing impact of major development proposals and expansions on the City of McCall, its impact area, and surrounding vicinity;
- o Encourage or provide for affordable housing; and

WHEREAS, the health, safety and welfare of the citizens of the City of McCall is dependent upon a reasonable supply of affordable, deed restricted workforce housing (community housing) being made available to ensure that critical professional workers, essential service personnel, and service workers live within proximity to their work to provide municipal and private sector services; and

WHEREAS, the City of McCall has determined through public input and the comprehensive planning process that a reasonable supply of community housing is needed to promote the social and economic diversity of the City; and

WHEREAS, the economic vitality and well-being of the citizens of the City of McCall is dependent upon a reasonable supply of community housing, and that persons such as medical personnel, peace officers, emergency personnel, fire personnel, and providers of other professional services, which are vital to the community, are dependent upon the availability of community housing; and

WHEREAS, to advance these objectives the City, in partnership with Valley County, Adams County, and the communities of Cascade, Donnelly, and New Meadows, commissioned a Housing Market and Needs Assessment for Valley and Adams County (Housing Needs Assessment) that was completed July, 2005; and

WHEREAS, the Housing Needs Assessment determined that 210 community housing units are currently needed in Valley and Adams Counties, including 145 low to moderate income homes for families earning 50 to 100% of annual median income and 65 moderate to middle income homes for families earning 100 to 160% of annual median income; and

WHEREAS, the Housing Needs Assessment determined that 200 additional homes are needed in Valley and Adams Counties in the next two years, including 138 low to moderate income homes and 62 moderate to middle income homes; and

WHEREAS, the Housing Needs Assessment determined that housing is needed for the families of a significant number of the 700 to 1,000 construction workers estimated to be working in Valley and Adams Counties and commuting to their homes elsewhere, reducing the vitality of the local economy; and

WHEREAS, the Housing Needs Assessment determined that the total number of units needed to catch up with demand in Valley and Adams Counties is between 550 and 610 units of Community Housing; and

WHEREAS, the City of McCall encompasses approximately 20% of the region's population and employment; and

WHEREAS, 20% of the housing needed to catch up with demand, as identified in the Housing Needs Assessment is 110 to 122 homes, including 76 to 84 low to moderate income homes and 34 to 38 moderate to middle income homes; and

WHEREAS, the City of McCall is presently comprised of approximately 40% year round primary residences and approximately 60% seasonally-occupied homes; and

WHEREAS, the City of McCall desires to maintain the current ratio of year round primary residences to seasonally-occupied homes as the community grows; and

WHEREAS, the McCall City Council held housing policy discussions at City Council meetings on July 14, 2005 and August 11, 2005; held public information sessions on housing policy on August 20, 2005 and August 23, 2005, and held public hearings on a proposed Housing Policy on September 7, 2005 and September 22, 2005; and

WHEREAS, to assure the existence of a supply of desirable and affordable housing for persons currently employed in the McCall area, persons who were employed in the McCall area prior to retirement, the disabled, and other qualified persons of the McCall area, the City of McCall adopted the following Community Housing Policy (Resolution 05-19) on September 22, 2005:

1. Responsibility
 - 1.1. The City of McCall is responsible for developing and implementing a community housing program to meet the needs of its citizens.
 - 1.2. The City of McCall will develop and implement this program in partnership with other local, state, and federal agencies.
 - 1.3. The City of McCall will regularly refine its community housing policy to reflect new information and changing market conditions.
2. Seasonal/Year Round Housing Mix

- 2.1. McCall's Community Housing Program will be designed and implemented to maintain the ratio (60/40) of seasonally-occupied homes to year round primary residences as the community grows.
3. Intended Beneficiaries
 - 3.1. McCall's Community Housing Program will be designed to benefit:
 - 3.1.1. Low, moderate, and middle income families
 - 3.1.2. Local workers
 - 3.1.3. Senior citizens
 - 3.1.4. Special needs populations
4. Income Targets
 - 4.1. The policy will develop housing targeted to meet the needs of the following household types:
 - 4.1.1. Low Income – 50% of median income
 - 4.1.2. Moderate Income – 80% of median income
 - 4.1.3. Middle Income – 160% of median income
5. Job/Housing Relationship
 - 5.1. Community housing will be developed primarily for people with jobs in the community.
 - 5.2. McCall will house at least 50 percent of its workforce within city limits.
6. Production Goals
 - 6.1. To keep up with demand and eliminate our community housing backlog within ten years, McCall is committed to providing:
 - 6.1.1. 43 additional low to moderate income homes annually
 - 6.1.2. 22 additional moderate to middle income homes annually
 - 6.1.3. Senior and special needs housing in quantities to be determined
7. Ownership/Rental Mix
 - 7.1. McCall will develop community housing to maintain at least 65 percent owner occupied housing within the year round resident community.
8. Location/Unit Type
 - 8.1. Community housing requirements for new development will be met within the geographic boundaries of new development to the extent possible.
 - 8.2. Mixed use projects will be encouraged to incorporate community housing into commercial and industrial areas.
 - 8.3. Public community housing resources will focus on infill and redevelopment to:
 - 8.3.1. Maintain and enhance existing neighborhoods;
 - 8.3.2. Promote a jobs-housing balance;
 - 8.3.3. Reduce reliance on the automobile; and
 - 8.3.4. Promote smart growth principals and reduce sprawl.
9. Design and Quality
 - 9.1. Community housing is civic architecture and reflects the values of the community.
 - 9.2. Community housing should be designed to fit its context.
 - 9.3. Design within budget is a characteristic of good design; and

WHEREAS, Resolution 05-19 directs staff to develop ordinances to implement the Community Housing Policy for consideration by the Planning & Zoning Commission and the City Council, including an Inclusionary Housing Ordinance; and

WHEREAS, 24% of the City's households have incomes between 100% and 160% of the area median income, and these households can no longer afford housing in McCall; and

WHEREAS, the best available data indicates that the average price of a home for sale in McCall currently exceeds \$300,000; and

WHEREAS, the best available data indicates that the growth of the area as a resort community will continue to fuel rising housing prices while concurrently increasing the demand for a workforce that can not afford housing; and

WHEREAS, the best available data indicates that approximately 15% of the families currently residing in McCall have sufficient income to afford the mortgage payments of a \$300,000 home; and

WHEREAS, the development and construction of residential dwelling units create the need for local employees to service and maintain the dwelling units, and the residents thereof; and

WHEREAS, some form of community housing assistance and requirements are needed to maintain a local workforce;

NOW, THEREFORE, BE IT ORDAINED BY THE MAYOR AND CITY COUNCIL OF THE CITY OF McCALL, IDAHO THAT:

SECTION 1: Title 9, McCall Zoning Code is hereby by amended by adding Section 9.7.10, Inclusionary Housing, to read as follows:

9.7.10 INCLUSIONARY HOUSING

A Twenty (20) percent of the lots and houses in all subdivisions, including condominium subdivisions, approved and platted after the adoption date of this Section shall be permanently restricted as community housing to be affordable to City of McCall households with incomes in categories III and IV as defined in subsection 2, Community Housing by Income, below.

1. Options for Providing Community Housing

An applicant for subdivision approval may propose and the City Council may approve, pursuant to the priorities and criteria established below, any of four (4) options, or combination thereof, to provide Community Housing that is required by this Section.

- a. First priority is for the applicant to build community housing on the site of the subdivision.
- b. Second priority is for the applicant to build community housing off site of the subdivision.
- c. Third priority is for the applicant to convey land for community housing.
- d. Fourth priority is for the applicant to pay a fee-in-lieu for community housing.

2. Community Housing by Income Category

Fifty (50) percent of the required community housing lots and/or housing units shall be affordable to households in each of the two (2) income categories below.

- a. Category III includes households earning more than one hundred (100) percent but not more than one hundred twenty (120) percent of the Valley County median household income.
- b. Category IV includes households earning more than one hundred twenty (120) percent but not more than one hundred sixty (160) percent of the Valley County median household income.
- c. The median household income for Valley County is derived and annually updated by the U. S. Department of Housing and Urban Development.

3. On Site Community Housing

Community housing units shall be constructed on the site of the subdivision in such a manner as to create an integrated subdivision unless the City Council finds the provision of on-site community housing is impractical by making one (1) or more of the following findings.

- a. The Inclusionary Housing Plan proposed by the applicant includes constructing on-site community housing, constructing off-site community housing, and/or land conveyance and this plan is found by City Council to be in conformance with the City of McCall Comprehensive Plan and Housing Policy.

- b. The community housing units are subject to federal and/or state financial assistance and the on-site location cannot comply with the terms and conditions of the financial assistance.
- c. The number of required community housing units results in less than one (1) housing unit.
- d. The community housing units located on-site would be incompatible with the surrounding lands because of conflicting uses, site plan design or bulk.

4. Off Site Community Housing

If the City Council finds that constructing some or all of the required on-site community housing is impractical, community housing shall be constructed off-site from the subdivision unless the City Council determines that land conveyance better achieves community housing goals. The proposed off-site location shall be suitable for community housing by complying with all of the following standards.

- a. Development of community housing at the "off-site" location will comply with the goals of the City of McCall Housing Policy.
- b. The community housing units can be designed and built in a way that is compatible with surrounding land uses.
- c. Community housing at the "off-site" location will comply with applicable Zoning and Subdivision Code requirements.
- d. The density permitted on the subdivision site may be devoted fully to free-market lots and the off-site community housing units shall be included in the total number of subdivision lots when calculating the community housing requirement.
- e. The number of community housing units constructed off-site shall be provided in an amount equal to:
 - a. 125 percent of the amount which would have been required had it been provided on-site if the off-site housing is within the city limits of the City of McCall. If only a portion of the required Community Housing is off-site, only that portion shall be subject to the 125% factor.
 - b. 150 percent of the amount which would have been required had it been provided on-site if the off-site housing is within the city limits of another municipality located in Valley or Adams County. If only a portion of the required Community Housing is off-site, only that portion shall be subject to the 150% factor.

- c. 200 percent of the amount which would have been required had it been provided on-site if the off-site housing is within unincorporated Valley or Adams County. If only a portion of the required Community Housing is off-site, only that portion shall be subject to the 200% factor.

5. Land Conveyance

If the City Council finds it is impractical to construct on-site community housing and determines a land conveyance for community housing better serves the City's community housing goals than the construction of off-site community housing, the conveyance of land for community housing may be accepted pursuant to the following standards.

- a. The land shall provide for community housing in appropriate locations by complying with the following.
 - 1) Community housing on the land shall comply with the goals of the City of McCall Housing Policy.
 - 2) The land shall be near existing or planned employment centers, schools and commercial services.
 - 3) Housing on the site shall comply with applicable Zoning and Subdivision Code requirements.
 - 4) Notwithstanding this subsection, the Council may accept land that does not meet these criteria if the sale of the land is anticipated pursuant to subsection e, below.
- b. The fair market value of the land shall equal the total subsidy amount for the number of required community housing units as calculated in Section 9.7.10.A.4.e as the subsidy amount is calculated by the City Community Development Director pursuant to the Community Housing Guidelines, as amended.
 - 1) A professional real estate appraiser licensed to practice in Idaho shall establish the fair market value of the land to be conveyed.
 - 2) Fair market value shall be established on a preliminary basis at the time the Inclusionary Housing Plan (subsection 9.0 below) is reviewed.

- 3) Fair market value shall be confirmed at the time of review and approval of the final subdivision plat for the free market portion of the subdivision.
- 4) Fair market value shall be net of any customary real estate commissions for the sale of the land.
- c. The land conveyance shall occur prior to the City signing the final plat verifying subdivision approval, unless the City Council approves other arrangements with financial assurances.
- d. The land conveyed shall be used for the development of community housing units or conveyed pursuant to subsection e, below.
- e. The City Council is permitted to sell land conveyed for community housing if:
 - 1) All proceeds from the sale of the land are placed in the Community Housing Trust Account (subsection 11.0 below); and,
 - 2) The proceeds from the sale of the land and any interest accrued thereon are used only for subsidizing or constructing community housing within a reasonable period of time.

6. In Lieu Fee

The City Council shall accept an in lieu fee for any fraction of a required community housing unit. The fee shall be calculated and collected pursuant to the following standards.

- a. The fee shall be calculated by averaging the subsidy amounts for providing a community housing unit in each of the two (2) Income Categories III and IV. The fee amount shall be proportionate to the fraction of the community housing unit required. The subsidy amounts for each Income Category shall be calculated by the Community Development Director pursuant to the Community Housing Guidelines, as amended.
- b. Prior to September 30, 2006, and on or before September 30 of each following year, the subsidy amount used in the in lieu fee calculation shall be evaluated by the Community Development Director, and if necessary, adjusted to reflect current land and construction costs and the current median income.

- c. The in lieu fee shall be paid prior to the City signing the final plat verifying subdivision approval, unless the City Council approves other arrangements with financial assurances. In lieu fees shall be deposited into a separate account pursuant to subsection 11, Community Housing Trust Account.

7. Deed Restrictions

The lots and houses for community housing shall be permanently deed restricted as to the initial and resale price, minimum size and construction standards, and qualifications of buyers and renters, pursuant to the Community Housing Guidelines, as amended. Provided however, if within nine (9) months after a community housing unit is first available for sale there are no qualified purchasers of the unit, the City Council shall, upon request of the developer, remove the community housing deed restrictions and the unit may be sold by the developer at a market price.

As an alternative to permanent deed restriction, an applicant may request that up to twenty five (25) percent of the lots and houses be subject to an "Equity-Builder" program pursuant to the Community Housing Guidelines.

8. Timing of Occupancy

All community housing units shall be ready for occupancy, or their construction costs bonded and a specific timeline approved by the City Council, no later than the date of the initial occupancy of the free-market portion of the residential subdivision for which the community housing is required. If the subdivision is approved for phased development, the community housing units may be constructed, or bonded with an approved timeline, in proportion to the phases of the subdivision.

9. Inclusionary Housing Plan

An applicant for subdivision approval shall submit an Inclusionary Housing Plan concurrently with the initial application submittal for the subdivision. The Inclusionary Housing Plan shall be prepared and reviewed pursuant to the following standards.

- a. The Inclusionary Housing Plan shall include the following:

- 1) The calculation of the number of community housing units required.
- 2) The proposed method of providing community housing (on-site, off-site, conveyance of land and/or payment of an in lieu fee) and the appropriate justification.
- 3) If community housing units are to be constructed, the Plan shall include:
 - (a) A conceptual site plan and building floor plan illustrating the number of community housing units proposed their location in relation to the other development on the site and surrounding land uses, and the number and size of bedrooms and square footage of each unit.
 - (b) A tabular summary of the number of community housing units, the number and size of bedrooms of each unit, the rental/sale mix, and the sales price or rent for each unit.
 - (c) The proposed restrictions to be placed on the community housing units to ensure they remain affordable and comply with the Community Housing Guidelines, as amended.
- 4) If payment of an in lieu fee is proposed, the Plan shall include the amount of the fee to be paid and the supporting calculations.
- 5) If land is to be conveyed, the Plan shall include:
 - (a) A survey depicting the location, size and topography of the land proposed for conveyance.
 - (b) A title report demonstrating clear title, physical and legal access, liens, easements, and other information necessary to fully describe the legal status of the property.
 - (c) Verification that conditions of the land, any restrictions on title to the land (such as covenants and easements) and the applicable Land Use Codes allow the development of residential units on the land, and that the site generally can be developed for community housing.

- (d) An appraisal of the fair market value of the land.
- (e) Any additional information or studies determined by the Community Development Director to be necessary to verify the suitability of the land for development.

6) **Community Housing Agreement**

The agreement by a developer to implement the Plan shall be established in a Community Housing Agreement. The Agreement shall be in a form approved by the City Attorney and shall include the following:

- (a) If the Plan proposes the construction of community housing units, the Agreement shall identify: the location, number, type and size of community housing units to be constructed; sales and/or rental terms; occupancy requirements; a timetable for completion of the units; construction specifications; and the restrictions to be placed on the units to ensure their permanent affordability and compliance with the Community Housing Guidelines, as amended.
- (b) If the Plan proposes the conveyance of land, the Agreement shall identify the land to be conveyed, its fair market value, and the time at which the land will be conveyed to the City.
- (c) If the Plan proposes the payment of an in lieu fee, the Agreement shall identify the amount of the fee to be paid, and the time of payment.
- (d) If the Plan proposes a combination of methods (construction of units, conveyance of land, or in lieu fee), the Agreement shall identify the appropriate provisions for each method of mitigation.

b. **Review of the Inclusionary Housing Plan**

- 1) The procedures for review of the Inclusionary Housing Plan shall be the same as for the subdivision application with which it is submitted.
- 2) The Plan shall be approved, approved with conditions, or disapproved by the Planning & Zoning Commission and the City Council, based on the standards of this Section. A decision on the Plan shall be made prior to a decision on

the residential subdivision with which it is submitted. A subdivision plat shall not be approved without an Inclusionary Housing Plan approved pursuant to the procedures and standards of this Section.

- 3) An approved Inclusionary Housing Plan may be amended or modified only in accordance with the procedures and standards established for its original approval.

10. Community Housing Guidelines

The construction and occupancy of all community housing units shall comply with the Community Housing Guidelines, as amended from time to time by the City Council. If any conflict should arise between the Community Housing Guidelines and this Ordinance, the provisions contained in this Ordinance shall control.

- a. All community housing units constructed pursuant to this Section shall comply with the sales and/or rental terms, appreciation rates, housing type, and occupancy requirements of the Community Housing Guidelines, as amended.
- b. All community housing units shall comply with the size, materials and design requirements and construction standards of the Community Housing Guidelines, as amended.
- c. All community housing units shall comply with all other requirements of the Community Housing Guidelines, as amended, to ensure they are maintained, occupied and owned/rented as community housing units.

11. Community Housing Trust Account

- a. For the purpose of ensuring that any fees collected pursuant to this section are spent for community housing and consequently benefit the fee payers, an interest-bearing Community Housing Trust Account shall be established.
- b. All fees collected pursuant to this section shall be immediately deposited into the Community Housing Trust Account.
- c. All proceeds in the Community Housing Trust Account not immediately necessary for expenditure shall be invested in an interest-bearing account. All income derived from these investments shall be retained in the trust account until spent or refunded.

- d. All funds deposited into the Community Housing Trust Account and accrued interest shall be expended only for the purposes of planning, subsidizing or developing community housing units in McCall.

12. Refund of In Lieu Fee

- a. A fee collected pursuant to this section and three (3) percent interest compounded annually, shall be returned upon written request, to the developer of the subdivision for which a fee was paid if the fee has not been obligated within five (5) years from the date the fee was paid. Notwithstanding, if the City Council has earmarked the funds for expenditure on a specific community housing project, the Council may extend the time period by up to five (5) additional years.
- b. To obtain the refund, the developer must submit a written request to the Community Development Director within one (1) year from the end of the fifth (5th) year from the date payment was received, or within one (1) year from the end of the time this refund requirement is extended by the City Council. Said request shall be accompanied by proof of ownership of the property at the time the refund is requested or contract or option to purchase at the time the refund is requested, and a copy of the receipt verifying payment of the fee.
- c. For the purpose of this Section, fee payments shall be deemed spent in the order in which they are paid. The first (1st) payment made shall be the first (1st) payment spent.

13. Adjustments

- a. The requirements of this section 9.7.10 may be adjusted or waived by the City Council if the developer demonstrates and the Council finds that there is no reasonable relationship between the housing impact of the proposed residential subdivision and the requirements of this section.
- b. The developer shall have the burden of providing economic information or other data and evidence necessary to establish that the housing impact of the proposed residential subdivision has no reasonable relationship to the requirements of this chapter.
- c. The developer must make said demonstration concurrently with the first submittal of an application for the residential subdivision.

- d. The City Council shall make the determination to adjust or maintain the requirements of this section concurrently with the initial decision to approve or deny the proposed residential subdivision.

SECTION 2 Severability.

In the event that any court of competent jurisdiction enters its judgment or order declaring any portion of Section 9.7.10 to be invalid, then such judgment shall only affect that portion of the ordinance so adjudicated, and all other remaining portions shall remain in full force and effect.

EFFECTIVE DATE

Regularly passed, approved and adopted by the Mayor and City Council of the City of McCall, Idaho, this 22nd day of February, 2006.

(seal)



W. A. [Signature]
Mayor

ATTEST:

Joanne E. York
City Clerk

**A SUMMARY OF ORDINANCE NO. 819
PASSED BY THE CITY OF McCALL, IDAHO**

AN ORDINANCE OF THE CITY OF McCALL, IDAHO AMENDING THE CITY OF McCALL SUBDIVISION AND DEVELOPMENT CODE, TITLE 9 TO REQUIRE ALL NEW SUBDIVISIONS TO INCLUDE A CERTAIN NUMBER OF COMMUNITY HOUSING UNITS TO BE AFFORDABLE TO THE CITY'S WORKFORCE.

The principal provisions of Title 9 by adding Section 9.7.10, Inclusionary Housing, requires as follows:

- Provides for Inclusionary Housing, which provides for at least twenty percent of the housing to be affordable community housing and provides options for providing the community housing.
- Provides for Community Housing by Income Category, which requires that a minimum of twelve (12) percent of the community housing lots and/or housing units to be affordable.
- Provides for a Community Housing On Site section.
- Provides for a Community Housing Off Site section.
- Provides for a Land Conveyance section.
- Provides for a Fee In Lieu section, which provides that a fee shall be calculated and collected according to certain standards.
- Provides for a Deed Restriction section and includes a provision for a nine (9) month period if within this time period there are no qualified buyers of the unit that the City Council may remove the community housing deed restrictions.
- Provides for a Timing of Occupancy section.
- Provides for an Inclusionary Housing Plan that provides for calculation of the number of housing units required and review of the inclusionary housing plan.
- Provides for a Community Housing Guidelines section.
- Provides for a Community Housing Trust Account section to ensure the fees collected benefit the fee payers; that the fees are deposited into the trust account, and to allow for an interest-bearing account and for accrued interest.
- Provides for a Refund of In Lieu Fee section.
- Provides for an Adjustments section.

The Ordinance shall be effective upon publication of this Summary.

The full text of the Ordinance is available for review at City Hall and will be provided by the City Clerk to any citizen upon personal request. The full text is also available online at www.mccall.id.us.

APPROVED BY THE COUNCIL OF THE CITY OF McCALL, IDAHO, THIS 9th DAY OF March, 2006.



Approved:

By: W. W. W.
Mayor

Attest:

By: Joanne E. York
City Clerk

msgW:\Work\W\McCall, City of 21684\2006 Ordinances\Sum Ord Inclusionary Housing Title 9 Subdiv & Develpmt Code 03 01 06.doc

**EXHIBIT “B”
ALPINE VILLAGE
DEVELOPMENT AGREEMENT**

EXHIBIT "B"

Recording Requested By and
When Recorded Return to:

City Clerk
City of McCall
216 East Park Street
McCall, Idaho 83638

Instrument # 328801

VALLEY COUNTY, CASCADE, IDAHO

2008-01-28

04:27:07 No. of Pages: 9

Recorded for: CITY OF MCCALL

ARCHIE N. BANBURY

Ex-Officio Recorder Deputy

Index to: MISCELLANEOUS RECORD

Fee: 0.00

For Recording Purposes Do
Not Write Above This Line

DEVELOPMENT AGREEMENT ALPINE VILLAGE PLANNED UNIT DEVELOPMENT

This Development Agreement is entered into by and between the City of McCall, a municipal corporation of the State of Idaho, hereinafter referred to as the "City", and Alpine Village Company, hereinafter referred to as "Alpine Village", whose address is 1101 W. River Street, Suite 300, Boise Idaho, 83702, and who is the owner of the Alpine Village Planned Unit Development ("the PUD"), which is more particularly described in the attached Exhibit "A".

WHEREAS, the Preliminary and General Development Plans for the PUD have been granted by the City, as PUD No. 06-3 and the Preliminary Plat for the PUD has been approved by the McCall Planning and Zoning Commission, as Subdivision 06-7.

WHEREAS, the said approvals contained various conditions regarding which the City and Alpine Village have reached agreement and which agreement the City and Alpine Village desire to memorialize.

WHEREAS, Alpine Village has submitted its Application for Approval of the Final Plat for Phase 1 of the PUD, and anticipates submitting final plats for the balance of the PUD in phases ("the Phases").

WHEREFORE, the City of McCall and the Alpine Village do enter into this Agreement for and in consideration of the mutual covenants, duties and obligations herein set forth, do agree as follows:

ARTICLE I LEGAL AUTHORITY

- 1.1 This Development Agreement is made pursuant to and in accordance with the provisions of Section 9.6.06 of the McCall City Code.

**ARTICLE II
SANITARY SEWER SYSTEM IMPROVEMENTS**

- 2.1 Alpine Village shall relocate the existing sewer through the PUD as part of its construction of Phase 1 of the PUD and shall complete such work in accordance with the approved plans therefor as a condition of final approval of its Phase 2 Final Plat. Alpine Village shall be responsible for establishing to the satisfaction of the City that the existing sewer line has adequate capacity for the PUD and its proposed uses, together with the current upstream flow. Otherwise, Alpine Village shall replace the line as necessary to assure such capacity. The City shall be responsible for the pro rata cost of materials and labor for any additional capacity upgrade which is requested by the City.
- 2.2 The City shall be solely responsible for any replacement of the Washington Street sewer line, or any portion thereof, which is deemed necessary by the City, as well as all associated services and stub-outs.

**ARTICLE III
WATER SYSTEM IMPROVEMENTS**

- 3.1 Alpine Village shall complete all of the following described work in accordance with the approved plans therefor as part of its construction of Phase 1 of the PUD and shall complete such work as a condition of final approval of its Phase 2 Final Plat:
 - 3.1.1 Installation of a new 8-inch water line on Washington Street, from 3rd Street to 1st Street. Alpine Village shall be responsible for 100% of the cost of this work, as well as the re-connection of all existing services to the new line.
 - 3.1.2 Relocation of two (2) fire hydrants on the PUD Property to locations which are reasonably acceptable to the City. Alpine Village shall be responsible for 100% of the cost of such relocation.
 - 3.1.3 Unless determined unnecessary by the City, replacement of an existing 6 inch line in 1st Street, approximately between Washington Street and Railroad Avenue with an 8 inch line. The City shall reimburse Alpine Village for 100% of the cost of this work.

ARTICLE IV ROADS

- 4.1 Alpine Village shall pave all of Railroad Ave from 1st Street to 3rd Street, at a minimum width of twenty (20) feet, in accordance with City specifications, by no later than the later to occur of the following: (a) twelve (12) months after the City secures the required right-of-way; or, (b) the final approval of the Final Plat for the Phase of the PUD which includes Building No. 3, as shown on the Application for PUD General Plan approval. In the event that the City is unable to secure the required right-of-way, then Alpine Village shall pave the portion of Railroad Avenue between 1st and 3rd Street for which adequate right-of-way exists. Alpine Village shall be responsible for 100% of the cost of this work.
- 4.2 As a condition of the final approval of its Final Plat for Phase 1 of the PUD, in lieu of providing sidewalk, curb and gutter along Railroad Avenue, Alpine Village shall construct sidewalk, curb and gutter along the Washington Street and 3rd Street frontages of the Bryan's Burger Den Property.
- 4.3 As a condition of the final approval of the Final Plat for Phase 1 of the PUD, Alpine Village shall prepare and submit a complete application to the Idaho Transportation Department ("ITD") for construction of a center turn lane along the 3rd Street/Highway 55 frontage of the PUD; and, upon the issuance of such Permit by ITD, Alpine Village shall construct such center turn lane. Such construction shall be completed in accordance with the approved plans therefor by no later than the later to occur of the following: (a) twelve (12) months after ITD issues its final Permit for the project; or, (b) the final approval of the Final Plat for Phase 2 of the PUD. Alpine Village shall be responsible for 100% of the cost of this work.
- 4.4 Alpine Village shall repave the full width of Washington Street wherever adjustments to the profile or the cross section of the Street are required for the PUD and shall reconnect Washington Street to existing driveways and entrances which are disturbed by such adjustments according to approved construction plans. Alpine Village shall be responsible for 100% of the cost of this work.

ARTICLE V STORM WATER

- 5.1 Alpine Village shall relocate the existing 24 inch storm water line which passes through the PUD as part of its construction of Phase 1 of the PUD and shall complete such work in accordance with the approved plans therefor as a condition of final approval of its Phase 2 Final Plat. Alpine Village shall be responsible for 100% of the cost associated with the relocation.
- 5.2 The City has determined that an increase in the size of the line from 24 to 30 inches is required to accommodate existing and projected flows. The City shall pay for the increased cost of materials for such upsizing.

- 5.3 Alpine Village and the City shall continue in good faith to evaluate the feasibility of a regional storm water BMP and the possible use by Alpine Village of and participation by Alpine Village in the cost of creating such a BMP.

ARTICLE VI PARKS AND SNOW REMOVAL

- 6.1 As part of its final platting of Phase 1 of the PUD, Alpine Village shall dedicate all of the area within the PUD which as platted as "Plaza Open Space" in a manner which assures that such area is open to the public during reasonable commercial hours and subject to scheduled special events. Material modifications to such dedication shall require the prior approval of the City.
- 6.2 Alpine Village shall provide one public restroom facility (ie. for men and women) which shall be open to the public during reasonable commercial hours.
- 6.3 The Alpine Village Property Owners Association shall be solely responsible for the maintenance and upkeep of the Plaza and the restrooms.
- 6.4 Alpine Village shall construct a connection between the Plaza Open Space and the pedestrian bike path located north of Railroad Avenue. This work shall occur prior to the submittal of Phase 3 final plat or prior to January 1, 2012, the earlier to occur.
- 6.5 The Alpine Village Property Owners Association shall be solely responsible for the snow removal and storage. Pending platting of the final Phase of the PUD, snow shall be stored on-site, in the area designated as "Future Development" on the Final Plat for Phase 1 of the PUD. A permanent off-site snow storage area shall be properly established prior to the final approval of the Final Plat for whichever of the PUD Phases is the last to be platted.

ARTICLE VII COMMUNITY HOUSING PLAN

- 7.1 Alpine Village's approved Community Housing Plan is attached hereto as Exhibit "B". Alpine Village waives and releases the City from any claims whatsoever regarding or stemming from the pending litigation between the Mountain Central Board of Realtors and the City (ie. Mountain Central Board of Realtors, et al v. City of McCall, et al, Valley County Case Number CV-2006-490-C) as to Community Housing Units which are sold pursuant to this Plan prior to the final disposition of such litigation. The Plan will be reviewed and modified, as necessary, to comply with the final disposition of the litigation as to any Community Housing Units which have not been sold prior to the final disposition of the litigation.

**ARTICLE VIII
CITY COST CONTRIBUTION**

- 8.1 On any of the aforesaid items of work performed by Alpine Village for which, under the terms of this Agreement, the City has agreed to reimburse Alpine Village for part or all of the cost of such work, the City shall reimburse Alpine Village as follows:
- 8.1.1 Upon completion of such work in accordance with the approved plans therefor, Alpine Village shall deliver a Notice of Completion together with an Invoice for the actual cost to Alpine Village of such work to the City;
 - 8.1.2 The City shall notify Alpine Village within ten (10) days after receiving such notice and Invoice of any claimed deficiencies or non-conformities of such work with the approved plans, and/or of any entries on the Invoice which the City considers inappropriate under the terms of this Agreement;
 - 8.1.3 Absent such notification, the work and the Invoice shall be deemed accepted by the City;
 - 8.1.4 In the event of such notification regarding work deficiencies or non-conformities or Invoice improprieties, the parties shall attempt in good faith to resolve any disputed issues. If the parties are unable to do so, then any such remaining disputes shall be resolved by binding arbitration according to the rules of the American Arbitration Association.
 - 8.1.5 The City shall remit the full amount of such Invoice, unless adjusted by mutual agreement or arbitration, to Alpine Village no later than forty-five (45) days after the later to occur of the following: (i) the City's receipt of the Invoice; (ii) in the event that corrective measures are undertaken by Alpine Village, as provided herein, the completion of such corrective measures; or, (iii) in the event of a dispute between the City and Alpine Village regarding the work or the Invoice, the final resolution of the dispute.

**ARTICLE IX
POWER, TELEPHONE AND CABLE TELEVISION**

- 9.1 Power, telecommunications and cable is currently available to the PUD.

**ARTICLE X
ALPINE VILLAGE' S FINANCIAL ASSURANCES**

- 10.1 Alpine Village shall guarantee 125% of the estimated cost to complete all of the public improvements for the PUD described in this Development Agreement, in accordance with the provisions of MCC 9.6.067(B) as follows:
- 10.1.1 The estimated cost to complete the Water System Improvements for Phase 1 of the PUD is \$89,985.00. 125% of that sum (ie. \$112,481.25) will be

guaranteed by Alpine Village prior to Phase 1 Final Plat recordation by means of either a Letter of Credit.

- 10.1.2 The estimated cost to complete the improvements to 3rd Street / State Highway 55 is \$90,391.50. 125% of that sum (ie. \$112,989.38) will be guaranteed by Alpine Village prior to Phase 1 Final Plat recordation by means of a Letter of Credit.
- 10.1.3 The estimated cost to complete the aforesaid storm water improvements is \$122,947.00. 125% of that sum (ie. \$153,683.75) will be guaranteed by Alpine Village prior to Phase 1 Final Plat recordation by means of a Letter of Credit.
- 10.1.5 Completion of the public improvements for subsequent phases of the PUD will be guaranteed by Alpine Village prior to Final Plat recordation for those Phases, in the manner provided above.

ARTICLE XI MISCELLANEOUS

- 11.1 This Agreement may be modified only by means of a subsequently executed and acknowledged written agreement.
- 11.2 In the event Alpine Village fails to comply with the commitments set forth herein, within one hundred twenty (120) days of written notice of such failure from the City, in addition to any other remedies which the City may have available to it, the City shall have the right, without prejudice to any other rights or remedies, to cure such default or enjoin such violation and otherwise enforce the requirements contained in this Development Agreement, and to collect the direct costs associated with such action from Alpine Village.
- 11.3 In the event that a judicial dispute arises regarding the enforcement or breach of this Agreement, or arbitration ensues pursuant to Article VIII above, then the prevailing party in such dispute shall be entitled to recover its attorneys' fees and costs reasonably incurred, including fees and costs incurred in on appeal.
- 11.4 If any term, provision, commitment or restriction of this Development Agreement or the application thereof to any party or circumstances shall, to any extent be held invalid or unenforceable, the remainder of this Agreement shall remain in full force and effect.
- 11.5 After its execution, this Development Agreement shall be recorded in the office of the Valley County Recorder, at the expense of Alpine Village. Each commitment and covenant contained in this Agreement shall constitute a burden on, shall be appurtenant to, and shall run with the PUD Property. This Development Agreement shall be binding on the City and Alpine Village and their respective heirs, administrators, executors, agents, legal representatives, successors and

assigns; provided, however, that if all or any portion of the PUD Property is divided, each owner of a legal lot shall only be responsible for duties and obligations associated with an owner's parcel and shall not be responsible for duties and obligations or defaults as to other parcels of lots within the Property. Alpine Village shall not be relieved of its responsibilities and duties under this Agreement absent an agreement with the City which designates a successor to Alpine Village, who accepts such responsibilities and duties as are then remaining.

- 10.6 Any notice which a party may desire to give to another party must be in writing and may be given by personal delivery, by mailing the same by registered or certified mail, return receipt requested postage prepaid, or by Federal Express or other reputable overnight delivery service, to the party to whom the notice is directed at the address of such party set forth below:

McCall: City Clerk
City of McCall
216 East Park
McCall, Idaho 83638

Alpine Village: Alpine Village Company
1101 West River Street, Suite 300
Boise, Idaho 83702
Attn: Mike Hormaechea

With copy to:
Steve Millemann
Millemann, Pittenger, McMahan & Pemberton LLP
P.O. Box 1066
McCall, Idaho 83638

or such other address and to such other persons as the parties may hereafter designate in writing to the other parties. Any such notice shall be deemed given upon delivery if by personal delivery, or three (3) business days after deposit in the United States mail, if sent by mail..

EXHIBIT "A"

SECESH ENGINEERING, INC.

336 Delnhard Lane, Suite 1
P.O. Box 70
McCall, ID 83638
208-834-6336 • FAX 208-834-6322

DATE: May 25, 2007
PROJECT: 0415
PAGE: 1 OF 2

**LEGAL DESCRIPTION
ALPINE VILLAGE CONDOMINIUMS PHASE 1**

A parcel of land, a part of blocks 2, 5 and 6, vacated Lakeport Addition, located in the SW 1/4 of Section 9, T.18N., R.3 E., B.M., City of McCall, Valley County, Idaho, more particularly described as;

COMMENCING at the south 1/4 corner of said Section 9,

- A.) N.38°38'32"W., 869.03 feet to a point on the west Right-of-Way line for Third Street, and the SE corner block 6 Vacated Lakeport Addition; thence, along said Right-of-way,
- B.) N.0°03'08"E., 102.01 feet to the POINT OF BEGINNING; thence, departing said Right-of-Way,
 - 1.) N.90°00'00"W., 36.28 feet; thence,
 - 2.) N.0°00'00"E., 37.97 feet ; thence,
 - 3.) N.45°00'00"W., 129.94 feet; thence,
 - 4.) N.90°00'00"W., 59.94 feet; thence,
 - 5.) S.45°00'00"W., 81.66 feet; thence,
 - 6.) N.90°00'00"W., 94.78 feet; thence
 - 7.) N.0°00'00"E., 62.52 feet; thence,
 - 8.) N.44°59'55"E., 151.44 feet; to a point on a curve, thence,

- 9.) Northeasterly along said curve to the left having a radius of 2934.93 feet, an arc length of 234.08 feet, through a central angle of $4^{\circ}34'11''$, and a chord bearing and distance of $N.42^{\circ}55'53''E.$, 234.02 feet; thence
- 10.) $S.0^{\circ}46'47''W.$, 45.05 feet; thence,
- 11.) $S.89^{\circ}54'10''E.$, 127.93 feet; thence,
- 12.) $S.1^{\circ}07'41''W.$, 63.00 feet; thence,
- 13.) $N.89^{\circ}44'40''E.$, 162.52 feet; thence,
- 14.) $S.0^{\circ}03'08''E.$, 305.54 feet; to the POINT OF BEGINNING.

CONTAINING 2.28 Acres, more or less.

SUBJECT TO all Covenants, Rights-of-Way and Easements of Record.

EXHIBIT "B"
TO ALPINE VILLAGE DEVELOPMENT AGREEMENT
COMMUNITY HOUSING PLAN
FOR ALPINE VILLAGE PLANNED UNIT DEVELOPMENT
(May 22, 2007)

PUD Final Plan – 100 market rate units (3 more than PUD Preliminary Plan – incorporating Burger Den property)

Community Housing Requirements: 20 units

Proposed C.H. Units on-site: 6

Proposed C.H. Units off-site: 17, calculated as follows:

Remaining required C.H. units: 14

Off-site "penalty": 125%

Total C.H. off-site requirement: 17.50 (fractional unit to be covered by in lieu fee)

Implementation Relative to Project Phasing:

Phase 1 (consisting of 25 market rate units): 2 C.H. units on-site + 6 Timbers
Condominiums (2.25 units more than
phase requirement – 32% of units)

Phase 2 (consisting of 15 market rate units): 2 C.H. units on-site + 5 Timbers
Condominiums (3.75 units more than
phase requirement – 47% of units)

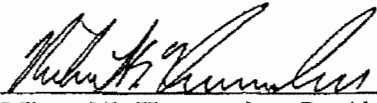
Phase 3 (consisting of 25 market rate units): 2 C.H. units on-site + 6 Timbers
Condominiums (2.25 units more than
Phase requirement – 32% of units)

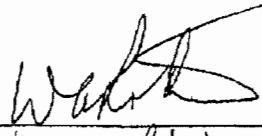
Phase 4 (consisting of 35 market rate units): .50 unit in lieu fee

IN WITNESS WHEREOF, the parties have hereunto caused this Agreement to be executed, effective on the day and year first above written.

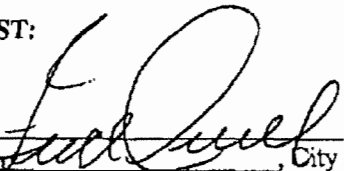
ALPINE VILLAGE COMPANY

CITY OF MCCALL

By: 
Michael B. Hormaechea, President

By: 
William A. Robertson, Mayor

ATTEST:

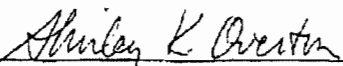
By:  City Clerk

STATE OF IDAHO,)
 (ss
County of Valley.)

On this 13 day of Dec, 2007, before me, Shirley K Overton, a Notary Public in and for said State, personally appeared **Michael B. Hormaechea**, President of **ALPINE VILLAGE COMPANY**, known or identified to me to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same for and on behalf of said Limited Liability Company.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.




NOTARY PUBLIC FOR IDAHO
My Commission Expires: 11-21-08

STATE OF IDAHO,)
(ss.
County of Valley.)

On this 13 day of Dec, 2007, before me, Shirley K. Overton, a
Notary Public in and for said State, personally appeared William A. Robertson
known or identified to me to be the **Mayor of the City of McCall**, who executed the said
instrument, and acknowledged to me that said municipality executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal,
the day and year in this certificate first above written.

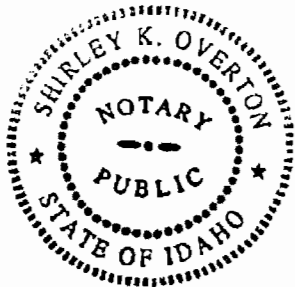


Shirley K. Overton
NOTARY PUBLIC FOR IDAHO
My Commission Expires: 11-21-08

STATE OF IDAHO,)
(ss.
County of Valley.)

On this 13 day of Dec, 2007, before me, Shirley K. Overton, a
Notary Public in and for said State, personally appeared Fred Buell,
known or identified to me to be the **City Clerk of the City of McCall**, who executed the said
instrument, and acknowledged to me that said municipality executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal,
the day and year in this certificate first above written.



Shirley K. Overton
NOTARY PUBLIC FOR IDAHO
My Commission Expires: 11-21-08

EXHIBIT “C”
MEMORANDUM DECISION AND
ORDER IN MOUNTAIN
CENTRAL BOARD OF
REALTORS, INC. V. CITY OF
MCCALL

EXHIBIT "C"

H. N. BANBURY, CLERK
BY [Signature] DEPUTY

FEB 19 2008

Case No. _____ Inst. No. _____
Filed _____ AM 5:00 PM

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

MOUNTAIN CENTRAL BOARD OF
REALTORS, INC., an Idaho Non-Profit
Corporation,

Plaintiff,

vs.

CITY OF MCCALL, a municipal corporation of
the State of Idaho,

Defendant.

Case No. CV 2006-490-C

MEMORANDUM DECISION
AND ORDER GRANTING
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT

APPEARANCES:

David Granton and Victor Villegas, for the Plaintiff

William A. Morrow, Christopher D. Gabbert, and Jill S. Holinka, for the Defendant

This matter came before the Court for oral argument on July 13, 2007, regarding Plaintiff's
Motion for Summary Judgment. On July 14, 2007, Plaintiff filed a Notice of Supplemental Authority.

FACTUAL AND PROCEDURAL BACKGROUND

The facts and procedural history of this case were set forth in more detail in the Court's
previously filed Memorandum Decision and Order Denying the Defendant City of McCall's Motion for
Summary Judgment on the issue of standing. Essentially, Plaintiff is challenging the constitutionality of
two ordinances passed in February of 2006 by the City of McCall: Ordinance No. 819 which is an
inclusionary zoning ordinance, and Ordinance No. 820 which is the residential linkage or community

MEMORANDUM DECISION AND ORDER - PAGE 1

1 housing fee ordinance.¹ Such ordinances were enacted to ensure and provide for affordable housing in
2 the City of McCall.

3 Under Ordinance No. 819, all applications for new subdivisions are required to submit an
4 inclusionary housing plan providing that twenty percent (20%) of lots and houses be permanently deed-
5 restricted as affordable community housing as a precondition to plat approval. Specifically, Ordinance
6 No. 819 is designed to provide for "community housing to be affordable to City of McCall households
7 with incomes in categories III and IV as defined in subsection 2, Community Housing by Income." City
8 of McCall Ordinance No. 819, § 9.7.10(A). These categories define moderate to middle income.
9 Category III includes households with incomes greater than one hundred percent (100%) but not more
10 than one hundred twenty percent (120%) of the Valley County median household income. Category IV
11 includes households with incomes greater than one hundred twenty percent (120%) but not more than
12 one hundred sixty percent (160%) of the Valley County median household income.
13

14 There are four ways by which an applicant for subdivision approval may meet the requirements
15 of Ordinance No. 819: (1) the first priority is to permanently deed restrict twenty percent (20%) of the
16 land within the subdivision for affordable housing, called "on-site" housing; (2) the second priority is to
17 construct such housing "off-site" from the proposed subdivision;² (3) the third priority is to convey land;
18 and (4) the fourth priority is to pay a fee in lieu of the previous three options.
19
20

21 ¹ Although Ordinance No. 819 is referred to as the inclusionary zoning ordinance and
22 Ordinance No. 820 is the linkage ordinance, the Court generally refers in this
decision to both ordinances as inclusionary zoning ordinances.

23 ² If community housing is constructed off-site, the required percentage of land
24 allocated to affordable housing increases from twenty percent (20%) of the
subdivision land to one hundred twenty-five percent (125%) if the housing is built
25 within the city of McCall; or to one hundred fifty percent (150%) if the housing is
built within the city limits of another municipality located in Valley or Adams
26 Counties; or to two hundred percent (200%) if the housing is built within
unincorporated Valley or Adams Counties.

Under Ordinance No. 820, all applicants for a building permit are required to pay a community housing fee for each residential dwelling unit that is proportional to the demand for community housing created by the dwelling unit. Ordinance No. 820 is designed to benefit employees of low or moderate income in categories I and II who are needed to maintain and service the residential dwelling unit.¹ Low income is defined in Category I as households with incomes greater than fifty percent (50%) but not more than eighty percent (80%) of the Valley County median household income. Income Category II includes households with incomes greater than eighty percent (80%) but not more than one hundred percent (100%) of the Valley County median household income. Certain residential development is exempted under Ordinance No. 820 such as redevelopment, remodeling or relocation of any legally pre-existing residential unit, expansion up to 500 square feet, mobile homes, skilled nursing facilities, retirement or assisted living homes, foster homes, and community housing units. City of McCall Ordinance No. 820, § 3.8.21(C).

Plaintiff filed a Verified Complaint on September 22, 2006, seeking declaratory relief that the City of McCall's Ordinance Numbers 819 and 820 violate both State and Federal laws and constitutions, and seeking a permanent injunction enjoining the City from enforcing such ordinances against its members. Defendant filed an Answer on October 18, 2006, asserting a number of affirmative defenses including no justiciable case or controversy, ripeness, standing, failure to join an indispensable party.

¹ Ordinance No. 820 defines the community housing fee as follows:

The community housing fee shall be commensurate with the current community housing subsidy amount required to develop and construct community housing for fifty (50) percent of the employees needed to maintain and service the dwelling unit and who have incomes in Income Categories I and II. The number of employees needed to maintain and service the residential unit varies based on the size of the unit.

City of McCall Ordinance No. 820, § 3.8.21(D)(1)(a).

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1 and no irreparable injury.

2 Plaintiff filed a Motion for Summary Judgment along with a Motion to File Brief Exceeding
3 Twenty-Five (25) Pages on November 20, 2006. This Court entered an Order Granting Plaintiff's
4 Motion to File Brief Exceeding Twenty-Five (25) Pages on November 29, 2006. On December 6, 2006,
5 the parties filed a Stipulated Litigation Schedule. Defendant filed a Stipulation to Exceed Page Limit on
6 February 7, 2007, allowing Defendant to file a Response Brief in excess of the twenty-five page limit.

7 On May 22, 2007, this Court issued a Memorandum Decision and Order Denying the Defendant
8 City of McCall's Motion for Summary Judgment, holding that the Plaintiff did have "associational"
9 standing to pursue its claim. On May 31, 2007, the parties filed a Stipulation to Amend Litigation
10 Schedule. Also on that date, Plaintiff filed an Amended Notice of Hearing.

11 STANDARD OF REVIEW

12 Idaho Rule of Civil Procedure 56 provides that summary judgment is proper when the court is
13 satisfied that "there is no genuine issue as to any material fact and that the moving party is entitled to
14 judgment as a matter of law." I.R.C.P. 56(c). All disputed facts are to be resolved and all reasonable
15 inferences drawn in favor of the non-moving party. See *Stafford v. Klosterman*, 134 Idaho 205, 206, 998
16 P.2d 1118, 1119 (2000); *Smith v. Meridian Joint Sch. Dist. No. 2*, 128 Idaho 714, 719, 918 P.2d 583,
17 588 (1996). If reasonable persons could reach different findings or draw conflicting inferences from the
18 evidence, the motion must be denied. *Jordan v. Beeks*, 135 Idaho 586, 590, 21 P.3d 908, 912 (2001);
19 *Smith*, 128 Idaho at 718, 918 P.2d at 587.

20 The district court as the trier of fact may draw reasonable inferences based upon the evidence
21 before it and may grant summary judgment despite the possibility of conflicting inferences. *Klosterman v.*
22 *Jamerson*, 132 Idaho 910, 913, 980 P.2d 574, 577 (Ct. App. 1999) (citing *Cameron v. Neal*, 130 Idaho
23 898, 900, 950 P.2d 1237, 1239 (1997)). See also Idaho Code Ann. § 10-1201 (2005). Where the matter
24
25
26

27 MEMORANDUM DECISION AND ORDER - PAGE 4

1 would be tried without a jury, the court is "free to arrive at the most probable inferences to be drawn
2 from uncontroverted evidentiary facts." *Loomis v. City of Halley*, 119 Idaho 434, 437, 807 P.2d 1272,
3 1275 (1991); accord *Steiner v. Ziegler-Tamura Ltd.*, 138 Idaho 238, 241, 61 P.3d 595, 598 (2002). If
4 the evidentiary facts are not in dispute, the trial court may grant summary judgment despite the
5 possibility of conflicting inferences, because the court alone will be in the position of resolving the
6 conflicting inferences at trial. *Riverside Development Co. v. Ritchie*, 103 Idaho 515, 519, 650 P.2d 657,
7 661 (1982).

8
9 In order to challenge the constitutionality of a statute or ordinance, the plaintiff has the burden of
10 showing the invalidity of such statute or regulation and must overcome the strong presumption of
11 validity. *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 709, 791 P.2d 1285, 1288 (1990); see also *Wyckoff*
12 *v. Board of County Commissioners*, 101 Idaho 12, 14, 607 P.2d 1066, 1068 (1980). "It is generally
13 presumed that legislative acts are constitutional, that the state legislature has acted within its
14 constitutional powers, and any doubt concerning interpretation of a statute is to be resolved in favor of
15 that which will render the statute constitutional." *Olson*, 117 Idaho at 709, 791 P.2d at 1288. The party
16 asserting a facial challenge to an ordinance must demonstrate that the "law is unconstitutional in all of
17 its applications. . . . [And] that no set of circumstances exists under which the [law] would be valid."
18 *American Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Resources*, 143 Idaho 862, ___, 154 P.3d
19 433, 441 (2007) (internal quotes omitted).

20 21 DISCUSSION

22 Inclusionary zoning ordinances appear to be a recent trend in the efforts of local communities,
23 especially in seasonal economy-based communities, to address the needs of providing affordable housing
24 for the local workforce. Inclusionary zoning or inclusionary housing ordinances generally require a
25 residential developer to set aside a specific percentage of new housing units for low or moderate income
26

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1 households. *Home Builders Ass'n of Northern California v. City of Napa*, 108 Cal.Rptr.2d 60, 62 n.1
2 (Cal. Ct. App. 2001) (citing Laura M. Padilla, *Reflections on Inclusionary Housing and a Renewed Look*
3 *at its Viability*, 23 Hofstra L. Rev. 539, 540 (1995)).⁴

4 While a number of jurisdictions have case law discussing the constitutionality of inclusionary
5 zoning ordinances, there is no case precedent which has been established in Idaho. Furthermore, there is
6 no legislative authority in Idaho providing for inclusionary zoning provisions. Although not controlling,
7 this Court is aware that a Decision on Summary Judgment was filed July 3, 2007, in Blaine County
8 regarding an as-applied challenge to the City of Sun Valley's Workforce Housing Linkage Ordinance
9 No. 364, in *Schaefer v. City of Sun Valley, Idaho*, Case No. CV-06-882.

11 In the case before this Court, there are no genuine issues of material fact. The dispositive issue is
12 the purely legal question of whether Ordinance Nos. 819 and 820 are proper police power regulations of
13 the City of McCall. This Court defers to the City of McCall's determination of a lack of affordable
14 housing and to their laudable intention to address the issue; the question for this Court, however, is
15 whether the methods of remedying this housing shortfall pass legal muster.

16 In Idaho, "a municipal corporation may exercise only those powers granted to it by either the
17 state constitution or the legislature . . ." *Caesar v. State*, 101 Idaho 158, 160, 610 P.2d 517, 519 (1980).
18 Article 12, Section 2 of the Idaho State Constitution provides for any county, city, or town to make and
19 enforce all such local police, sanitary, and other regulations which are not in conflict with its charter or
20 with the general laws. Idaho Const. Art. 12 § 2. The Idaho Supreme Court has recognized that "[t]he

23 ⁴ *Home Builders Association of Northern California* illustrates the trend toward
24 inclusionary zoning ordinances, especially in California where there is extensive
25 legislation providing for affordable housing incentives. See Cal. Gov't Code §
26 65980 et seq. This case relied upon by the City of McCall is of little assistance
to courts in Idaho where there is not extensive legislative authority for
inclusionary zoning ordinances.

power to restrict the uses of property is within the police power of the state, delegable to its municipal subdivisions, and is not per se repugnant to the Constitution of the United States." *White v. City of Twin Falls*, 81 Idaho 176, 182, 338 P.2d 778, 781-82 (1959). Therefore, the power to zone derives from the police power of the state, and local legislative entities are authorized to enact zoning ordinances restricting the use of property within the corporate limits of the legislative entity. *City of Lewiston v. Kierleim*, 107 Idaho 80, 83, 685 P.2d 821, 824 (1984); see also *Dawson Enterprises, Inc. v. Blaine County*, 98 Idaho 506, 511, 567 P.2d 1257, 1262 (1977).

The Local Land Use Planning Act (LLUPA), at Idaho Code Section 67-6501 *et seq.*, was enacted in 1975. The Idaho Supreme Court has found that under LLUPA, "the legislature intended to give local governing boards broad powers in the area of planning and zoning." *White v. Bannock County Commissioners*, 139 Idaho 396, 400, 80 P.3d 332, 336 (2003) (citing *Warley Hwy. Dist. v. Kootenai County*, 104 Idaho 833, 663 P.2d 1135 (Ct. App. 1983)). Such zoning power is not unlimited, but must bear a reasonable relation to the goals of the state pursuant to the state's police powers. *Sprenger, Grubb & Assocs, Inc. v. City of Hailey*, 127 Idaho 576, 583, 903 P.2d 741, 748 (1995) (citing *City of Lewiston v. Kitterlam*, 107 Idaho 80, 83, 685 P.2d 821, 824 (1984)); see also *Dawson Enterprises, Inc.*, 98 Idaho at 511, 567 P.2d at 1262.

The governmental power to interfere by zoning regulations with the general rights of the land owned by restricting the character of his use, is not unlimited, and other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare.

Dawson Enterprises, Inc., 98 Idaho at 511, 567 P.2d at 824 (citing *Cole-Collister Fire Protection Dist. v. City of Boise*, 93 Idaho 558, 468 P.2d 290 (1970) (quoting *Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1927))).

The Idaho Supreme Court has recognized that LLUPA is the exclusive and mandatory source for a municipality's planning and zoning authority. *Sprenger, Grubb & Assocs, Inc. v. City of Hailey*, 133 Idaho 320, 321, 986 P.2d 343, 344 (1999). Under the LLUPA, a governing board, consisting of either a city council or a properly delegated planning and zoning commission, is given the powers authorized under the LLUPA. Idaho Code Ann. § 67-6504. Under section 67-6508, the planning and zoning commission is to conduct a comprehensive planning process designed to prepare a comprehensive plan which outlines the desirable goals and objectives for each planning component including in pertinent part:

An analysis of provisions which may be necessary to insure that land use policies, restrictions, conditions and fees do not violate private property rights, adversely impact property values or create unnecessary technical limitations on the use of property and analysis as prescribed under the declarations of purpose in chapter 80, title 67, Idaho Code.⁶

Idaho Code Ann. § 67-6508(a).⁶ Furthermore, the comprehensive plan should include a provision relating to housing containing:

An analysis of housing conditions and needs; plans for improvement of housing standards; and plans for the provision of safe, sanitary, and adequate housing, including the provision for low-cost conventional housing, the siting of manufactured housing and mobile homes in subdivisions and parks and on individual lots which are sufficient to maintain a competitive market for each of those housing types and to address the needs of the community.

Idaho Code Ann. § 67-6508().⁷ The LLUPA expressly identifies the need to maintain a balance between protecting property rights and providing for affordable housing by stating that one of its

⁶ Title 67, chapter 80 of the Idaho Code is known as the Idaho Regulatory Takings Act, which establishes a review process to evaluate regulatory takings.

⁷ Subsection (a) on property rights was added in 1995. Local Land Use Planning-Property Rights-Planning and Zoning Commissions, ch. 101, sec. 4, § 67-6508, 1995 Idaho Sess. Laws H.B. 212.

1 purposes is "[t]o protect property rights while making accommodations for other necessary types of
2 development such as low-cost housing and mobile home parks." Idaho Code Ann. § 67-6502(a).

3 With respect to zoning ordinances, the LLUPA provides that the governing board shall "establish
4 standards to regulate and restrict the height, number of stories, size, construction, reconstruction,
5 alteration, repair or use of buildings and structures; percentage of lot occupancy, size of courts, yards,
6 and open spaces; density of population; and the location and use of buildings and structures." Idaho
7 Code Ann. § 67-6511. Furthermore, the governing board may "require or permit as a condition of
8 rezoning that an owner or developer make a written commitment concerning the use or development of
9 the subject parcel." Idaho Code Ann. § 67-6511A.

10
11 The inclusionary zoning ordinances at issue in this case go well beyond the traditional zoning
12 standards relating to height, size, construction, zoning areas, open space requirements, density, and
13 location. The City of McCall argues it is regulating the use to which certain land or housing may be put
14 by requiring developers to deed restrict a percentage of new development as affordable or community
15 housing. There is no doubt that the City of McCall determined there exists a need for affordable housing
16 in McCall. Although LLUPA specifically allows a city to include within its comprehensive plan
17 regulations affecting property rights and housing conditions, LLUPA does not specifically address
18 whether the City of McCall or any other city may enact inclusionary zoning ordinances. Given the
19 relatively recent trend towards inclusionary zoning ordinances since LLUPA has been enacted in Idaho,
20 it is not surprising that LLUPA does not specifically address inclusionary zoning ordinances. Thus,
21
22
23

24 ¹ Also in 1995, the Legislature inserted the language regarding low-cost housing.
25 Local Land Use Planning-Property Rights-Planning and Zoning Commissions, ch. 181,
26 sec. 4, § 67-6508, 1995 Idaho Sess. Laws H.B. 212.

whether the City of McCall may require affordable housing through a land use regulation is a matter of first impression which this Court must decide.

A. Restrictions on the City of McCall's Police Powers

The Idaho Supreme Court has recognized three general restrictions on a municipality's police powers: (1) the ordinance must be confined to the limits of the governmental body enacting the same; (2) such ordinance must not be in conflict with other general laws of the state; and (3) such ordinance must not be an unreasonable or arbitrary enactment. *Hobbs v. Abrams*, 104 Idaho 205, 207, 657 P.2d 1073, 1075 (1983) (citing *State v. Clark*, 88 Idaho 365, 374, 399 P.2d 955, 960 (1965)).

1. Regulation Within the City Limits of McCall

In *Hobbs*, the county passed an ordinance which prohibited the sale of beer in kegs in "Franklin County," and also prohibited the possession of beer in kegs within the "unincorporated areas of Franklin County." 104 Idaho at 207, 657 P.2d at 1075. The plaintiff in that case owned two businesses licensed to sell beer in Franklin, Idaho and Preston, Idaho. The Idaho Supreme Court held that the plaintiff did not have standing to challenge the ordinance since his businesses were within an incorporated city and the county did not have the authority to regulate activities within incorporated cities. *Id.* at 208, 657 P.2d at 1076. Similarly, in the underlying case, the City of McCall's Ordinance Nos. 819 and 820 only have power and effect within the limits of the City of McCall. Although the ordinances repeatedly state that such ordinances have been implemented in partnership with Valley County, Adams County, and the communities of Cascade, Donnelly, and New Meadows, Ordinance Nos. 819 and 820 can only regulate land use permits in the City of McCall.⁸ Therefore, Ordinance Nos. 819 and 820 would not apply to a landowner who owns and wishes to subdivide land located outside the city limits of McCall.

⁸ Pursuant to Ordinance No. 819, if a developer provides community housing off-site, the developer is required to provide 125 percent of the amount of land which would

2. Not in Conflict with Other General Laws of the State

Under the second prong of *Hobbs*, this Court must determine whether Ordinance Nos. 819 and 820 are in conflict with other general laws of the state. The stated purpose of these ordinances is to provide a "reasonable supply of affordable, deed restricted workforce housing (community housing)" to "ensure that critical professional workers, essential service personnel, and service workers live within proximity to their work to provide municipal and private sector services." In order to obtain a building permit to subdivide land and build houses or dwelling units, a landowner must designate at least twenty percent of the land or lots as deed-restricted community housing under Ordinance No. 819. Furthermore, in order to build residential dwelling units, a landowner is required to pay a community housing fee for a building permit under Ordinance No. 820.

Pursuant to Ordinance No. 819, upon applying for subdivision approval, a developer must submit an Inclusionary Housing Plan which designates that at least twenty percent of all the lots and houses in the subdivision have been permanently deed-restricted⁹ as community housing and affordable to households in McCall with moderate or middle incomes in categories III and IV. Ordinance No. 819 specifically states that providing on-site community housing within the new subdivision is the first priority. However, if a landowner or developer is not able to designate community housing within the proposed subdivision, the second priority is for the developer to designate community housing outside

have been required on-site, if the off-site housing is "within the city limits of the City of McCall." Alternatively, if the off-site housing is located "within the city limits of another municipality located in Valley or Adams County," the developer is required to provide 150 percent of the amount which would have been required on-site. To the extent that the City of McCall attempts to regulate housing outside its city limit, such provision is without effect and therefore null and void.

⁹ Ordinance No. 819 also provides that as an alternative to permanent deed restriction, the developer may request that up to twenty-five percent of the lots and houses be subject to an "Equity-Builder" program.

MEMORANDUM DECISION AND ORDER - PAGE 11

1 the subdivision, or "off-site." The third priority is for a developer to convey land to the City of McCall
2 for community housing. And the fourth priority is to pay a fee in lieu of community housing.
3 Essentially, the McCall City Council decides pursuant to the priority list if on-site community housing is
4 impractical.

5 Under the first two priorities, a landowner still retains ownership of such community housing
6 units but is restricted regarding selling or renting community housing units.¹⁰ The third and fourth
7 priorities are reserved for situations in which it is not practical for the landowner to develop community
8 housing either on or off site because the required community housing units results in less than one
9 housing unit.¹¹ Under the third and fourth priorities, the landowner either conveys land calculated at fair
10 market value, or pays a fee equal to the total subsidy amount for the required community housing units.
11 Additionally, if the number of required community housing units result in a fraction under the first or
12 second priority, the landowner must pay an in lieu fee equal to the subsidy amount for that fraction.
13

14 For any community housing units provided under the first or second priorities, the developer
15 must enter into a Community Housing Agreement which sets forth, among a number of other
16 requirements, the sales or rental terms and the restrictions to ensure the permanent affordability and
17 compliance with the Community Housing Guidelines. The McCall Planning & Zoning Commission and
18 the City Council have the power to review and approve the Inclusionary Housing Plan. If the City
19 Council collects in lieu fees pursuant to the fourth priority, or fees for any fractional amount of
20 community housing, such funds are to be deposited into the Community Housing Trust Account to be
21
22

23 ¹⁰ Potential buyers or renters must meet the requirements established by the City of
24 McCall to qualify for affordable housing.

25 ¹¹ Because the developer is required to set aside twenty percent of the units as
26 community housing, the minimum number of units a developer must develop under the
first or second priorities would be five units, of which one unit must be community

spent for planning, subsidizing, or developing community housing units in McCall. A landowner may petition for a refund of the in lieu fees if such fees have not been expended by the City of McCall within five years, provided the City has not already earmarked the funds and extended the time period another five years.

Furthermore, the City of McCall may adjust or waive the requirements under Ordinance No. 819 if the developer demonstrates and the City Council finds there is "no reasonable relationship between the housing impact of the proposed residential subdivision and the requirements of this section." City of McCall Ordinance No. 819, § 9.7.10(A)(13)(a). The developer has the burden of providing economic information or data necessary to establish that there is no reasonable relationship.

Ordinance No. 820 requires that every landowner seeking a building permit for a residential dwelling unit, not exempted by the ordinance,¹² is required to pay a community housing fee. This fee represents the subsidy amount required to develop and construct community housing for fifty percent of the employees needed to maintain and service the dwelling unit and who have low to moderate incomes in categories I and II. Such fees are also deposited in the Community Housing Trust Account and similarly to Ordinance No. 819, a landowner may request a refund of such fees if they have not been

housing. Subdivisions with less than five units presumably would be subject to either the third or fourth priorities.

¹² The following residential development units are exempted from the community housing fee:

1. The redevelopment, remodeling, or relocation of a legally pre-existing residential unit provided no new or additional residential unit is created.
2. The expansion up to five hundred square feet of gross floor area of a legally pre-existing residential dwelling unit.
3. Mobile homes.
4. Skilled nursing facilities.
5. Retirement or assisted living homes.
6. Foster and group homes.
7. Community housing units.

See City of McCall Ordinance No. 820, § 3.6.21 (C).

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1 spent within five years unless the City has earmarked such funds and extended the time an additional
2 five years. An applicant may also apply for a reduction or waiver of the community housing fee if such
3 person receives income within the Income Categories identified above or believes the residential unit
4 does not relate to the purposes and standards of Ordinance No. 820.

5 Plaintiff argues that Ordinance Nos. 819 and 820 exceed the City's zoning authority because they
6 attempt to regulate ownership as opposed to use of the property. Furthermore, Plaintiff argues that such
7 ordinances violate the general laws of the state because regulations relating to community housing have
8 been preempted by other state law, that such ordinances unconstitutionally control rent, that such
9 ordinances are disguised impact fees, or that they impose illegal taxes.

10
11 *n. Whether the Authority to Implement Affordable Housing has been Impliedly Preempted by State Law*

12 While Article 12, Section 2 of the Idaho Constitution is a grant of local police powers to Idaho
13 cities, this police power is limited in at least two important respects. First, cities cannot act in an area
14 which is so completely covered by general law as to indicate that it is a matter of state concern. Second,
15 cities may not act in an area where to do so would conflict with the state's general laws. *Caesar v. State*,
16 101 Idaho 158, 161, 610 P.2d 517, 520 (1980). Under the doctrine of implied preemption, where a state
17 has acted in an area in such a pervasive manner, it is assumed that the state intended to occupy the entire
18 field of regulation despite the lack of any specific language preempting regulation by local government
19 entities. *Id.* (citing *United Tavern Owners of Philadelphia v. School Dist. of Philadelphia*, 272 A.2d
20 868, 870 (Pa. 1971)).

21
22 In 1967, the Idaho Legislature enacted the Housing Authorities and Cooperation Law at Idaho
23 Code Section 50-1901 *et seq.* By enacting this statute, the Legislature recognized the need for sanitary
24 and safe dwelling accommodations for persons of low income. See Idaho Code Ann. § 50-1902(a).

1 Essentially, a housing authority is created as an independent public body corporate and politic by a
2 resolution of the governing body of the city, but is not an agency of the city. Idaho Code Ann. § 50-
3 1905; see also Idaho Code Ann. § 31-4205 (county housing authorities).¹³ The housing authority is
4 imbued with a number of powers necessary or convenient to carry out and effectuate the purposes and
5 provisions of the act. Specifically, a housing authority has the power to contract with other housing
6 authorities for services, create bylaws, rules and regulations, prepare, carry out, acquire, lease, and
7 operate housing projects, lease or rent dwellings, establish and revise rents, own, hold and improve real
8 or personal property, and acquire real property through eminent domain. Idaho Code Ann. § 50-1904(a),
9 (b), and (d).
10

11 Overall, Chapter 19, Title 50 of the Housing Authorities and Cooperation Law discusses a
12 housing authority's ability to own and acquire real property. Subsection (d) grants the housing authority
13 broad power with respect to leasing, renting, owning, purchasing, acquiring by gift, grant, bequest,
14 devise, or eminent domain, and selling, exchanging, transferring, assigning, pledging or disposing of any
15 real or personal property. Idaho Code Ann. § 50-1904(d). This is quite different from any "interest" the
16 City of McCall may have in a landowner's real property which is required to be earmarked as
17 community housing under the first two priorities of Ordinance No. 819.
18

19 This Court believes that the Idaho Legislature has carefully designated powers within a housing
20 authority in Chapter 19, Title 50 and Chapter 42, Title 31, of the Idaho Code (created either by a city or a
21 county) to address housing problems and provide for affordable housing to low income households.
22 Pursuant to those code sections, a housing authority may acquire real property primarily through two
23 mechanisms: the power of eminent domain and the issuance of bonds upon proper resolution. Idaho
24

25 ¹³ Chapter 19, Title 50 of the Idaho Code which governs city housing authorities is
26 essentially identical to Chapter 42, Title 31 governing county housing authorities.

Code Ann. §§ 50-1914, -1916; 31-4214, -4216. With such bonds, a housing authority may purchase or obtain real property.¹⁴ A housing authority may also acquire real property by gift, grant, bequest or devise. Alternatively, a housing authority may also acquire real property through loans. Idaho Code Ann. §§ 50-1904(i); 31-4204(i). Furthermore, a city or county may lend or donate money to the housing authority. Idaho Code Ann. §§ 50-1909; 31-4209. And the federal government may also loan, contribute or provide grants or other financial assistance to housing authorities. Idaho Code Ann. §§ 50-1923; 31-4223.

If a city or county finds that there exist "insanitary or unsafe" dwelling accommodations or that there is a shortage of safe and sanitary dwelling accommodations available to low income households, "[t]he governing body shall adopt a resolution declaring that there is a need for a housing authority." Idaho Code Ann. §§ 50-1905; 31-4205. Although a city or county is not required to create a housing authority, it seems apparent that if the city or county is faced with a need to address affordable housing, the appropriate mechanism for governing affordable housing is through a housing authority pursuant to either section 50-1901 *et seq.*, or section 31-4201 *et seq.*¹⁵ Essentially, these statutes provide the framework in which local governments are to address affordable housing.

¹⁴ If low income housing is owned by a non-profit organization such as a housing authority, it would be eligible to be exempt from taxation under Idaho Code Section 63-602GG. The Idaho Impact Fee Act, Idaho Code Section 67-8201 *et seq.*, also contains an incentive for affordable housing. Local governments may waive all or part of any impact fees as an incentive for developers to include affordable housing. Idaho Code § 67-8204(10).

¹⁵ By Resolution 10-06, Valley County and Adams County created a county housing authority known as VARHA pursuant to Idaho Code Section 31-4205. Under that section, a county may authorize the creation of a housing authority, with the ability to transact business and exercise powers, pursuant to a proper resolution declaring the need for an authority to function. Resolution 10-06 was adopted on January 23, 2006, signed by the Valley County Commissioners. While the City of McCall did not expressly authorize a city housing authority, it appears to rely on the findings and expertise of VARHA. Prior to the creation of VARHA, the City of McCall passed Resolution 05-19 providing for a community housing policy which was signed by Mayor Kirk L. Eimers on September 22, 2005. Ordinance Nos. 819 and 820

1 In 1972, the Idaho Legislature enacted Idaho Code Section 67-6201 *et seq.*, which created a state
 2 agency, the Idaho Housing and Finance Association, to address the issue of affordable housing.
 3 Essentially, the state housing association is empowered to conduct its business, make and execute
 4 agreements or contracts, and to lease, sell, construct, finance, any housing projects and to establish and
 5 revise rents or charges. Idaho Code Ann. § 67-6206(a), (b), (e), and (f). The state housing association is
 6 also empowered to own, hold and improve real property, purchase, lease, and obtain options upon,
 7 acquire by gift, grant, bequest, devise, eminent domain or otherwise any real property and to sell, lease,
 8 exchange, transfer, assign, pledge, or dispose of such property. Idaho Code Ann. § 67-6206(g), (h).
 9 Housing projects are to be subject to the local planning, zoning, sanitary and building laws, ordinances
 10 and regulations applicable to the locality of the housing projects. Idaho Code Ann. § 67-6209. Similar
 11 to housing authorities, the state housing association has the power of eminent domain and the power to
 12 issue bonds to achieve its purpose of providing affordable housing. Idaho Code Ann. § 67-6206.

14 The Legislature has also created the Idaho Housing Trust Fund for the purpose of providing a
 15 "continuously renewable resource known as a housing trust fund from the private and/or public moneys
 16 to assist low-income and very low-income citizens in meeting their basic housing needs, and that the
 17 needs of very low-income citizens should be given priority." Idaho Code Ann. § 67-8101. The housing
 18 trust funds are to be used to assist a variety of activities, including but not limited to:

- 20 (a) New construction, rehabilitation, or acquisition of housing units for occupancy by low-
income and very low-income households;
- 21 (b) Rent subsidies in new construction or rehabilitated multifamily units for low-income and
very low-income households;
- 22 ...

24 rely on Community Guidelines enacted by VARMA and to the extent that the City of
 25 McCall's Resolution allowed the City of McCall to enact inclusionary zoning
 26 ordinances, the administration of such ordinances is governed by VARMA.

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(e) Administrative costs for housing assistance groups or organizations which provide housing when such grant or loan will substantially increase the recipient's access to housing funds other than those available under this chapter;

(f) Acquisition of housing units for the purpose of preservation as housing for low-income and very low-income households;

Idaho Code Ann. § 67-8103(2). Local governments and local housing authorities may receive assistance from the state housing association. Idaho Code Ann. § 67-8104. Specifically, the Idaho Housing Trust Fund Act applies to low and very low income households; and defines low-income households as those with a median income of more than fifty percent but less than eighty percent of the median income of the area, and very-low income households as those with less than fifty percent of the median income. Idaho Code Ann. § 67-8102(9), (10).

The Plaintiff argues the Legislature specifically chose to address affordable housing in separate and distinct statutes. The statutes cited above do not make it an absolute requirement to build affordable housing. Rather, the Plaintiff argues such statutes limit a local government's ability to provide affordable housing through bonds or eminent domain or to offer incentives such as tax or impact fee exemptions to developers. The City of McCall, on the other hand, argues that none of the above statutes prohibit the City from passing legislation to provide for housing that is affordable to the City's workforce. What the above statutes make clear is that the Legislature has enacted provisions both through the Idaho Housing and Finance Association as well as local housing authorities at the city and county level to regulate affordable housing.

However, the Idaho Supreme Court has held that "[a] local ordinance which merely goes further than a state statute in imposing additional regulation of a given conduct does not conflict with state law." *Voyle v. City of Nampa*, 97 Idaho 597, 601, 548 P.2d 1217, 1221 (1976). Furthermore, under LLUPA, "[w]henver the ordinances made under this chapter impose higher standards than are

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1 required by any other statute or local ordinance, the provisions of ordinances made pursuant to this
2 chapter shall govern." Idaho Code Ann. § 67-6518. Although there is extensive statutory regulation
3 regarding community or affordable housing for low income households, this Court does not find that the
4 Legislature impliedly preempted the entire field of affordable housing. While such legislation may
5 provide the framework for regulations relating to affordable housing, there is nothing in these statutes
6 which appears to prevent a city from enacting a zoning ordinance with respect to affordable housing.

7 *b. Whether Ordinance No. 819 Operates as an Unauthorized Rent Control Provision*

8 Under Ordinance No. 819, if a developer constructs community housing units as rentals, the
9 developer is required to enter into a Community Housing Agreement which provides the construction
10 specifications, sales and/or rental terms, and the restrictions placed on the units to ensure their
11 permanent affordability and compliance with the Community Housing Guidelines. Such housing is
12 permanently deed-restricted affordable housing subject to the regulations governing potential renters
13 with qualifying income levels. VARHA recommends rental or sale prices to the City of McCall,
14 although the City has the ultimate authority on price or rent restrictions. Such deed restrictions and
15 affordable housing classification remain tied to the property and run with the land to future owners. The
16 City of McCall argues it retains an interest in the deed-restricted community housing through the
17 community housing agreement entered into by the property owners and through the regulations which
18 ensure that such housing remains affordable, thus preserving the governmental interest in such property.
19 Plaintiff argues that such rent restrictions amount to a violation of Idaho Code Section 55-307(2).

20
21
22 Idaho Code Section 55-307 provides in pertinent part as follows:

23 A local governmental unit shall not enact, maintain, or enforce an ordinance or resolution
24 that would have the effect of controlling the amount of rent charged for leasing private
25 residential property. This provision does not impair the right of any local governmental
26 unit to manage and control residential property in which the local governmental unit has
a property interest.

1 Idaho Code Ann. § 55-307(2) (emphasis added). The statute expressly allows a local governmental unit
2 to enact a resolution that would have the effect of controlling rent if the governmental unit has a
3 "property interest" in the residential property. The City argues it has an interest in such affordable
4 housing, explaining that its interest, while not a possessory interest, is a regulatory and administrative
5 interest "applied through VARHA, to maintain the upkeep and usefulness of such affordable housing
6 units and to ensure that such units are utilized only by those individuals qualifying for the low income
7 housing."
8

9 Under Idaho Code Section 50-1904, a city housing authority has the power to "lease or rent any
10 dwellings . . . embraced in any housing project . . . [and] to establish and revise the rents or charges
11 therefor." Idaho Code Ann. § 50-1904(d); *see also* Idaho Code Ann. § 31-4204(d) (county housing
12 authority). Furthermore, these provisions provide a housing authority with the power to acquire such
13 real property through eminent domain or with funds obtained through issuance of a bond. *See* Idaho
14 Code Ann. §§ 50-1914, -1916; 31-4214, -4216. A housing authority would clearly have a "property
15 interest" in such property and the authority to control rents. *See* Idaho Code Ann. §§ 50-1913 and 31-
16 4213. This Court does not conclude that the City of McCall possesses the same interest as a housing
17 authority which owns real property.
18

19 The City of McCall admits it has only a regulatory or administrative interest. This Court is not
20 convinced that such interest amounts to a "property interest" under section 55-307(2). The landowner or
21 developer of affordable housing would retain a property interest subject to regulation. To hold that a
22 local government entity has a property interest in real property when it exercises only a regulatory or
23 administrative function would essentially eviscerate Idaho Code Section 55-307, which prohibits a local
24 government from controlling rent charged for leasing private residential property.
25
26

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c. Whether the Ordinances Exact an Unauthorized Tax or are Disguised Impact Fees

Initially a distinction must be drawn with respect to Ordinance Nos. 819 and 820. These ordinances are essentially attempting to provide for affordable housing rather than regulate affordable housing. Although the Court defers to the City of McCall's findings relating to the need for affordable housing and the City's sincere efforts to provide for such, this Court is being asked to decide the constitutionality of the means the City of McCall is utilizing to provide for affordable housing. The City of McCall has meticulously engineered a land use provision which requires landowners and developers to give over something of value in exchange for the right to develop a subdivision or build a residential unit. While the City of McCall argues that Ordinance Nos. 819 and 820 merely regulate the growth of residential housing in McCall, it is undeniable that the stated goals of such ordinances are to provide for "a reasonable supply of affordable, deed restricted workforce housing (community housing)." Such ordinances contemplate that in exchange for approval and issuance of a building permit a landowner or developer must give over something of value, whether it be an agreement to provide deed-restricted inclusionary housing, the conveyance of land, or a fee under Ordinance Nos. 819 or 820. Therefore, this Court must determine whether the City of McCall has authority for exacting such "fee."¹⁶

¹⁶ When the Court uses the term "fee" it is referring to any and all of the priorities listed under Ordinance No. 819, and not merely the "in lieu fee" under the fourth priority. Furthermore, it is understood that under Ordinance No. 820, the community housing fee is a "fee" in any general sense of the word. The Court's analysis is not restricted to the fact that under the first two priorities of Ordinance No. 819, the landowner is not relinquishing control over his or her property. This does not mean that the landowner is not in essence paying a price or a "fee" to the City of McCall for the privilege of subdividing or erecting improvements on his or her land. This Court recognizes the fact that the City of McCall has characterized such requirement as a "subsidy amount," as defined by the provisions for land conveyance and the in lieu fee. See City of McCall Ordinance No. 819, § 9.7.10(A)(4)(e) and § 9.7.10(A)(5)(b). Therefore, it is appropriate for this Court to find that the requirements under any of the four priorities in Ordinance No. 819 constitute a "fee."

1 Municipalities are allowed pursuant to the Idaho Constitution to enact fees or impose taxes to
2 fund projects. Generally, there are two primary ways in which a municipality may impose charges on
3 the public or on particular persons: (1) by legislative enactment which specifically permits the
4 municipality to fund a project through the assessment of taxes or fees; or (2) pursuant to the police
5 power for the collection of revenue incidental to the enforcement of a regulation. See *Idaho Building*
6 *Contractors Ass'n v. City of Coeur D'Alene*, 126 Idaho 740, 742-43, 890 P.2d 326, 328-29 (1995).

7 Article 7, section 6 of the Idaho Constitution expressly provides that a city has the power to
8 assess and collect taxes for all purposes of the city corporation. Idaho Const. Art. 7 § 6. While Article
9 7, section 6 of the Idaho Constitution permits a municipal corporation to assess and collect taxes for the
10 purposes of the corporation, that taxing authority is not self-executing and is limited to that taxing power
11 given to the municipality by the Idaho Legislature. *Id.* at 742, 890 P.2d at 328 (citing *Brewster v. City of*
12 *Pocatello*, 115 Idaho 502, 503-04, 768 P.2d 765, 766-67 (1988)). Neither party has asserted any
13 statutory authority which would permit the City of McCall to impose a tax through Ordinance Nos. 819
14 and 820. In fact, the City of McCall denies that the fees or costs imposed upon landowners in either
15 Ordinance Nos. 819 or 820 constitute a tax. Rather, the City argues such fees are lawful pursuant to its
16 police powers.
17

18 Under Article 12, section 2 of the Idaho Constitution, a municipality may enact regulations
19 pursuant to its police power for the furtherance of the public health, safety, morals, or welfare of its
20 residents. Idaho Const. Art. 7 § 6. Pursuant to those police powers, a municipality may provide for the
21 collection of revenue incidental to the enforcement of a regulation. *Idaho Bldg. Contractors Ass'n*, 126
22 Idaho at 742-43, 890 P.2d at 328-29. However, such municipal fees must be rationally related to the cost
23 of enforcing the regulation and cannot be assessed purely as a revenue-generating scheme. *Brewster v.*
24 *City of Pocatello*, 115 Idaho 502, 504, 768 P.2d 765, 767 (1988). If the fee or charge is imposed
25
26

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1 primarily for revenue raising purposes, it is in essence a tax and can only be upheld under the power of
2 taxation. *Idaho Bldg. Contractors Ass'n*, 126 Idaho at 743, 890 P.2d at 329.

3 The City of McCall argues that Ordinance Nos. 819 and 820 are not revenue raising mechanisms,
4 but rather land use regulations enacted through the City's police powers to control zoning regulations
5 within the City's jurisdiction because such ordinances control a specific use of land and development.
6 Just as the City of Coeur D'Alene argued in *Idaho Building Contractors Association*, the City of McCall
7 argues that Ordinance Nos. 819 and 820 have been enacted for the purposes of promoting the health,
8 welfare, safety, and morals of the residents of McCall. See *Idaho Bldg. Contractors Ass'n*, 126 Idaho at
9 743, 890 P.2d at 329.

10 In *Brewster*, the Idaho Supreme Court addressed the validity of an ordinance passed by the City
11 of Pocatello charging a street restoration and maintenance fee upon all owners or occupants of property
12 in the City of Pocatello pursuant to a formula reflecting the traffic which was estimated to be generated
13 by that particular property. *Id.* at 502, 768 P.2d at 765. The Court held that "the revenue to be collected
14 from Pocatello's street fee has no necessary relationship to the regulation of travel over its streets, but
15 rather is to generate funds for the non-regulatory function of repairing and maintaining streets. The
16 maintenance and repair of streets is a non-regulatory function as the terms apply to the facts of the
17 instant case." *Id.* at 504, 768 P.2d at 767. The fee imposed by the ordinance in *Brewster* effectively was
18 a general tax rather than an incidental regulatory fee. "In a general sense a fee is a charge for a direct
19 public service rendered to the particular consumer, while a tax is a forced contribution by the public at
20 large to meet public needs." *Id.* at 505, 768 P.2d at 768.

21 Under Ordinance No. 819, the subsidy created either by requiring landowners to deed restrict a
22 percentage of units as community housing, to convey land, or to pay an in lieu fee appears to be an
23 innovative way of creating or generating affordable housing. Quite plainly, even the fees collected
24
25
26
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1 pursuant to Ordinance No. 820 are for the purpose of "planning, subsidizing, developing or constructing
2 community housing." City of McCall Ordinance No. 820, § 3.8.21(E)(4). To be a valid fee, the fee
3 must be incidental to the enforcement of the regulation and bear a reasonable relationship to the cost of
4 enforcing such regulation. *Brewster*, 115 Idaho at 504, 768 P.2d at 767; see also *Poster's Inc. v. Boise*
5 *City*, 63 Idaho 201, 118 P.2d 721 (1941).

6 The City of McCall argues it has specific statutory authority under the LLUPA to require a
7 subsidy under Ordinance No. 819, or a fee under Ordinance No. 820, to provide for safe, affordable,
8 housing. Generally speaking, the LLUPA governs zoning regulations such as setbacks, density, and
9 height regulations. See *Spranger, Grubb & Assoc. v. City of Hailey*, 127 Idaho 576, 903 P.2d 741
10 (1995). However, as discussed previously, the LLUPA does not provide the City with any authority for
11 enacting ordinances which require that developers provide affordable housing, let alone authority to
12 impose a fee or require a subsidy from landowners to further such goals. To the contrary, LLUPA
13 provides that:
14

15 Fees established for purposes of mitigating the financial impacts of development must
16 comply with the provisions of chapter 82, title 67, Idaho Code. Denial of a subdivision
17 permit or approval of a subdivision permit with conditions unacceptable to the landowner
18 may be subject to the regulatory taking analysis provided for by section 67-8003, Idaho
19 Code, consistent with the requirements established thereby.

20 Idaho Code Ann. § 67-6513. Chapter 82 is the Idaho Development Impact Fee Act,¹⁷ and provides for
21 the imposition by ordinance of development impact fees as a condition of development approval. Idaho

22 ¹⁷ The Idaho Development Impact Fee Act defines "affordable housing" as "housing
23 affordable to families whose incomes do not exceed eighty percent (80%) of the
24 median income for the service area or areas within the jurisdiction of the
25 governmental entity. Idaho Code Ann. § 67-8203(1). Furthermore, the act defines
26 "development requirement" as "a requirement attached to a developmental approval or
other governmental action approving or authorizing a particular development project,
including, but not limited to, a rezoning, which requirement compels the payment,
dedication or contribution of goods, services, land, or money as a condition of
approval." Idaho Code Ann. § 67-8203(10). Under section 67-8204,

Code Ann. § 67-8204. A development impact fee is "payment of money imposed as a condition of development approval to pay for a proportionate share of the cost of system improvements needed to serve development." Idaho Code Ann. § 67-8203(9). Such fees "shall not exceed a proportionate share of the cost of system improvements." Idaho Code Ann. § 67-8204(1).

The critical language in the Idaho Development Impact Fee Act is that the purpose of such act is to provide funds necessary for "planning and financing public facilities needed to serve new growth and development . . . necessary . . . to promote and accommodate orderly growth and development and to protect the public health, safety and general welfare." Idaho Code Ann. § 67-8202. Public facilities are defined as water works, waste facilities, roads, streets, and bridges, storm water collection, parks and capital improvements, as well as public safety facilities such as law enforcement, fire, emergency medical and rescue and street lighting facilities. Idaho Code Ann. § 67-8203(24). Ultimately, while the Idaho Development Impact Fee Act allows an exception to imposing a development impact fee on affordable housing, the Act does not contemplate the imposition of development impact fees to ensure an adequate affordable housing supply or to develop such. Therefore, this Court is unable to conclude

A development impact fee ordinance may exempt all or part of a particular development project from development impact fees provided that such project is determined to create affordable housing, provided that the public policy which supports the exemption is contained in the governmental entity's comprehensive plan and provided that the exempt development's proportionate share of system improvements is funded through a revenue source other than development impact fees.

Idaho Code § 67-8204(10). Essentially, a city may provide an incentive for the creation of affordable housing by exempting the development impact fee, provided that such exemption is within the city's comprehensive plan and that such proportionate share of system improvements is funded through another source such as state or federal funding of affordable housing.

If the fees imposed under Ordinance Nos. 819 and 820 are development impact fees, such fees would be contrary to the stated legislative intention to provide an exception to the imposition of such fees under section 67-8204 for the development of affordable housing.

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1 that either such subsidy under Ordinance No. 819, or fee under Ordinance No. 820, is appropriate under
2 the Idaho Development Impact Fee Act.

3 Additionally, the Idaho Supreme Court in *Idaho Building Contractors Association* found that the
4 fee imposed by the city's ordinance "purports to assess a fee to support additional facilities or services
5 made necessary by the development, and to shift the cost of those additional facilities and services from
6 the public at large to the development itself." *Id.* In *Idaho Building Contractors Association*, the City of
7 Coeur D'Alene had enacted an ordinance which required a capitalization fee to pay for a proportionate
8 share of the cost of improvements needed to serve development. The capitalization fee was imposed on
9 all building permits, in an attempt to have growth pay for growth. Relying on the analysis in *Brewster*,
10 the Court held:
11

12 [T]he assessment here is no different than a charge for the privilege of living in the City
13 of Coeur d'Alene. It is a privilege shared by the general public which utilizes the same
14 facilities and services as those purchasing building permits for new construction. The
15 impact fee at issue here serves the purpose of providing funding for public services at
16 large, and not to the individual assessed, and therefore is a tax. The fact that additional
17 services are made necessary by growth and development does not change the essential
18 nature of the services provided: they are for the public at large.

19 *Idaho Bldg. Contractors Ass'n*, 126 Idaho at 744, 890 P.2d at 330 (emphasis added).

20 The Idaho Supreme Court distinguished taxes from fees, stating that "taxes serve the purpose of
21 providing funding for public services at large, whereas a fee serves only the purpose of covering the cost
22 of the particular service provided by the state to the individual." *Id.* (citing *Alpert v. Boise Water Corp.*,
23 118 Idaho 136, 145, 795 P.2d 298, 307 (1990)). Quoting the *Brewster* Court, the Idaho Supreme Court
24 acknowledged its previous holding stating:

25 It is only reasonable and fair to require the business, traffic, act, or thing that necessitates
26 policing to pay this expense. To do so has been uniformly upheld by the courts. *On the*
27 *other hand, this power may not be resorted to as a shield or subterfuge, under which to*
28 *enact and enforce a revenue-raising ordinance or statute.*

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1 *Id.* (quoting *Brewster*, 115 Idaho at 504, 758 P.2d at 767). In *Idaho Building Contractors Association*,
2 the Idaho Supreme Court affirmed the district court's decision holding that the municipal ordinance
3 imposing fees was not authorized by the Development Impact Fee Act and that such fee was essentially a
4 tax providing funding for public services at large. *Id.* at 743-44, 890 P.2d at 329-30.

5 Likewise, the City of McCall is attempting to have growth in McCall pay for growth.
6 Essentially, landowners and developers are being charged a premium, by way of either a subsidy or a fee,
7 to live in the City of McCall. There has been no suggestion that the landowner or developer enjoys some
8 benefit, other than a benefit ostensibly to be realized by the public at large, from paying the subsidy or
9 building permit fee under Ordinance Nos. 819 and 820.¹⁸ While the landowner or developer may be
10 denied a permit to develop a subdivision or build a residential unit if he or she fails to provide the
11 subsidy or pay the fee, the "benefit" he or she receives in subdividing his or her land does not distinguish
12 the subsidy or fee from a tax. Admittedly, the benefit provided is to assure "a reasonable supply of
13 affordable, deed restricted workforce housing (community housing) being made available . . . [to] critical
14 professional workers, essential service personnel, and service workers" who are able to live within
15 proximity to their work. Whatever benefit the landowner receives is no different than a benefit received
16 and shared by the public at large. The lack of affordable workforce housing is a problem for which the
17 public should bear the cost to remedy rather than imposing the burden on a few landowners or
18
19
20
21

22 ¹⁸ The City of McCall attempts to argue that the benefit to the landowner is two-
23 fold: (1) assurance that "critical professional workers, essential service
24 municipal and private sector services;" and (2) incentives such as density bonuses,
25 equity builder programs, and priority in sewage and water hookups. The benefit of
26 essential workforce services is a benefit shared by the public at large. As to the
incentives a landowner receives, such incentives are not clearly outlined in the
ordinances themselves and this Court is not persuaded that such incentives are
provided in exchange for the subsidy or fees paid pursuant to Ordinance Nos. 819 and
820.

1 developers. Therefore, the purpose of the subsidy or fee under Ordinance Nos. 819 and 820 is for the
2 benefit of public services at large rather than a benefit to the individual assessed.

3 The City of McCall urges that this Court's analysis, in determining whether the fees imposed are
4 disguised taxes, should focus on whether the funds collected are disbursed in accordance with the stated
5 purpose of the regulation. However, this step in the analysis should come only after a determination that
6 the City of McCall had authority to impose such fees. In *Loomis v. City of Halley*, 119 Idaho 434, 807
7 P.2d 1272 (1991), and also in *Schmidt v. Village of Kimberly*, 74 Idaho 48, 256 P.2d 515 (1953), the
8 Idaho Supreme Court found that the fees imposed were collected pursuant to the Idaho Revenue Bond
9 Act. Under those circumstances, the Court was required to determine whether the fees were collected
10 under the guise of the Act and allocated and spent otherwise on projects not related to the ordinance.
11 Such is not the situation in the underlying case. Therefore, unless the Court finds the fees imposed
12 under Ordinance Nos. 819 and 820 are properly enacted pursuant to the City's police powers, it need not
13 determine whether such fees are being properly disbursed in accordance with the stated purposes of the
14 ordinances.

15
16 3. Whether Ordinance Nos. 819 and 820 are Unreasonable or Arbitrary

17 The third prong under *Hobbs* is to determine whether Ordinance No. 819 is a reasonable or
18 arbitrary enactment. The Plaintiff argues that Ordinance No. 819 operates as a regulation of ownership
19 rather than a land use regulation. As an ordinance regulating a landowner's ownership rather than use, it
20 is an arbitrary and unreasonable exercise of the police powers and violates the constitutional protection
21 given by the due process clause. The Plaintiff relies on *O'Connor v. City of Moscow*, 69 Idaho 37, 202
22 P.2d 401 (1949), for the proposition that a zoning ordinance may only regulate use, not ownership, of
23 property. *Id.* at 43, 202 P.2d at 404 ("A zoning ordinance deals basically with the use, not ownership, of
24 property.").

25
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1 In *O'Connor*, the Court recognized that generally, zoning regulations are divided into two
2 classes: "first, those which regulate the height and bulk of buildings within certain designated districts,
3 and second, those which prescribe the use to which buildings within certain designated districts may be
4 put." *Id.* at 41, 202 P.2d at 403. The City of Moscow attempted to restrict certain businesses to one area
5 of the business district in downtown by adopting an ordinance that provided any change of ownership
6 would constitute a new or additional business. Therefore, any non-conforming business which
7 attempted to sell to a new owner would be prohibited from operating such business as it was a "new or
8 additional" business.

9
10 Specifically, the *O'Connor* Court held that the provision of the ordinance declaring a change of
11 ownership to be a new business was void as being an arbitrary and unreasonable exercise of the city's
12 police power violating the constitutional protections given by the due process clause. *Id.* at 43, 202 P.2d
13 at 404. By enacting an ordinance relating to the business district and the uses of property within certain
14 limits of the city, the City of Moscow was regulating the use of such properties. However, attempting to
15 make a change in ownership a "new business" was arbitrary and unreasonable.

16
17 Likewise, the City of McCall can designate the use of specific property in zoning areas as
18 residential or commercial. However, the City of McCall's requirement that twenty percent of new
19 subdivisions be deed-restricted as community housing regulates much more than a landowner's "use" of
20 his or her property. The restrictions for community housing dictate the price for which the property may
21 be sold and to whom the property may be sold. Even if the landowner builds rental units, the restrictions
22 that twenty percent of the units be community housing also limit how much rent a landowner may charge
23 and to whom the units may be rented. These restrictions go much further than merely regulating the use
24 of property; instead, they essentially regulate ownership of the property by dictating to whom a unit may
25

1 be sold or rented. This Court concludes such "regulation" is arbitrary and unreasonable as a land use
2 provision.

3 This Court is convinced that the imposition of the subsidy or fee required under Ordinance Nos.
4 819 and 820 are, in reality, a tax, and not a regulation. Through such ordinances, the City of McCall has
5 attempted to provide for affordable housing either by requiring developers to pay for such by subsidizing
6 the housing market or by requiring landowners to pay a community housing fee for new residential
7 building permits. There is nothing which regulates the use of land other than requiring a landowner to
8 pay such subsidy or fees. Therefore, this Court finds that Ordinance Nos. 819 and 820 impermissibly
9 exceed the City's police powers as they impose a tax without legislative authority allowing the City of
10 McCall to enact such tax. Furthermore, to the extent that such ordinances attempt to regulate ownership
11 (i.e. restricting a landowner's right to sell or rent lots and units by requiring affordable housing
12 provisions), such ordinances are arbitrary and unreasonable.
13

14 Given these conclusions, there is no need to address the remaining issues or challenges by the
15 Plaintiff of violation of the Equal Protection Clause, the unconstitutional "taking" analysis, or the ability
16 of the City of McCall to contract with VARHA.
17
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MEMORANDUM DECISION AND ORDER - PAGE 30

CONCLUSION

For the foregoing reasons, this Court hereby GRANTS the Plaintiff's Motion for Summary Judgment, finding City of McCall Ordinance Nos. 819 and 820 exceed the City of McCall's police powers as they provide for unauthorized taxes and are, therefore, void and without force and effect. Counsel for Plaintiff shall submit any proposed judgments consistent with this decision, subject to the right of Defendant's counsel to review for form.

AND IT IS SO ORDERED.

Dated this 19th day of January, 2008.

Thomas F. Neville
Thomas F. Neville
District Judge

CERTIFICATE OF MAILING

I hereby certify that on this 19 day of February, 2008, I mailed (served) a true and correct copy of the within instrument to:

David Gratton
Victor Villegas
EVANS KEANE LLP
1405 West Main
P.O. Box 959
Boise, Idaho 83701-0959
Telephone: (208) 384-1800
Facsimile: (208) 345-3514

William A. Morrow
Christopher D. Gabbert
Jill S. Holinka
WHITE PETERSON, P.A.
5700 East Franklin Road, Suite 200
Nampa, Idaho 83687-7901
Telephone: (208) 466-9272
Facsimile: (208) 466-4405

ARCHIE N. BANBURY
Clerk of the District Court
Valley County, Idaho

Deputy Clerk



**EXHIBIT “D”
MCCALL
ORDINANCE NO. 856**

EXHIBIT "D"

ORDINANCE NO. 856

AN ORDINANCE OF THE CITY OF McCALL, VALLEY COUNTY, IDAHO, REPEALING SUBDIVISION AND DEVELOPMENT REGULATIONS CODE, MCC 9.7.10 TO REQUIRE ALL NEW SUBDIVISIONS TO INCLUDE A CERTAIN NUMBER OF COMMUNITY HOUSING UNITS TO BE AFFORDABLE TO THE CITY'S WORKFORCE (ORDINANCE 819), AND REPEALING AN ORDINANCE OF THE CITY OF McCALL, IDAHO AMENDING THE CITY OF McCALL ZONING CODE, MCC 3.8.21, TO REQUIRE A COMMUNITY HOUSING FEE TO BE PAID FOR EACH NEW RESIDENTIAL DWELLING UNIT (ORDINANCE 820) AND PROVIDING AN EFFECTIVE DATE.

BE IT ORDAINED BY THE MAYOR AND CITY COUNCIL OF THE CITY OF McCALL, IDAHO THAT:

SECTION 1: Enactment. MCC McCall City Code 9.7.10 and 3.8.21, Planning and Zoning is hereby repealed in its entirety as shown in Exhibit A.

SECTION 2: Savings Clause. The repeal of former Ordinance 819 and 820 shall not affect voluntary contributions to community housing as specified in subdivision and zoning map amendment development agreements.

SECTION 3: Effective Date. This ordinance or a summary thereof, shall be published once in the official newspaper of the City, and shall take effect upon its passage, approval, and publication.

PASSED BY THE COUNCIL OF THE CITY OF McCALL, IDAHO, THIS 24th DAY OF APRIL, 2008.

APPROVED BY THE MAYOR OF THE CITY OF McCALL, IDAHO, THIS 24th DAY OF APRIL, 2008.

By Bert Kulesza
Bert Kulesza, Mayor

ATTEST:

Brenna L Chaloupka
Brenna Chaloupka, Acting City Clerk

EXHIBIT A
Ordinance _____

ORDINANCE NO. 819

AN ORDINANCE OF THE CITY OF McCALL, IDAHO AMENDING THE CITY OF McCALL SUBDIVISION AND DEVELOPMENT REGULATIONS CODE, TITLE 9 TO REQUIRE ALL NEW SUBDIVISIONS TO INCLUDE A CERTAIN NUMBER OF COMMUNITY HOUSING UNITS TO BE AFFORDABLE TO THE CITY'S WORKFORCE, PROVIDE FOR A SEVERABILITY CLAUSE AND PROVIDE AN EFFECTIVE DATE.

WHEREAS, the Housing Component of the McCall Area Comprehensive Plan includes the following objectives:

- o Prepare for the housing impact of major development proposals and expansions on the City of McCall, its impact area, and surrounding vicinity;
- o Encourage or provide for affordable housing; and

WHEREAS, the health, safety and welfare of the citizens of the City of McCall is dependent upon a reasonable supply of affordable, deed restricted workforce housing (community housing) being made available to ensure that critical professional workers, essential service personnel, and service workers live within proximity to their work to provide municipal and private sector services; and

WHEREAS, the City of McCall has determined through public input and the comprehensive planning process that a reasonable supply of community housing is needed to promote the social and economic diversity of the City; and

WHEREAS, the economic vitality and well-being of the citizens of the City of McCall is dependent upon a reasonable supply of community housing, and that persons such as medical personnel, peace officers, emergency personnel, fire personnel, and providers of other professional services, which are vital to the community, are dependent upon the availability of community housing; and

WHEREAS, to advance these objectives the City, in partnership with Valley County, Adams County, and the communities of Cascade, Donnelly, and New Meadows, commissioned a Housing Market and Needs Assessment for Valley and Adams County (Housing Needs Assessment) that was completed July, 2005; and

WHEREAS, the Housing Needs Assessment determined that 210 community housing units are currently needed in Valley and Adams Counties, including 145 low to moderate income homes for families earning 50 to 100% of annual median income and 65 moderate to middle income homes for families earning 100 to 160% of annual median income; and

WHEREAS, the Housing Needs Assessment determined that 200 additional homes are needed in Valley and Adams Counties in the next two years, including 138 low to moderate income homes and 62 moderate to middle income homes; and

WHEREAS, the Housing Needs Assessment determined that housing is needed for the families of a significant number of the 700 to 1,000 construction workers estimated to be working in Valley and Adams Counties and commuting to their homes elsewhere, reducing the vitality of the local economy; and

WHEREAS, the Housing Needs Assessment determined that the total number of units needed to catch up with demand in Valley and Adams Counties is between 550 and 610 units of Community Housing; and

WHEREAS, the City of McCall encompasses approximately 20% of the region's population and employment; and

WHEREAS, 20% of the housing needed to catch up with demand, as identified in the Housing Needs Assessment is 110 to 122 homes, including 76 to 84 low to moderate income homes and 34 to 38 moderate to middle income homes; and

WHEREAS, the City of McCall is presently comprised of approximately 40% year round primary residences and approximately 60% seasonally-occupied homes; and

WHEREAS, the City of McCall desires to maintain the current ratio of year round primary residences to seasonally-occupied homes as the community grows; and

WHEREAS, the McCall City Council held housing policy discussions at City Council meetings on July 14, 2005 and August 11, 2005; held public information sessions on housing policy on August 20, 2005 and August 23, 2005, and held public hearings on a proposed Housing Policy on September 7, 2005 and September 22, 2005; and

WHEREAS, to assure the existence of a supply of desirable and affordable housing for persons currently employed in the McCall area, persons who were employed in the McCall area prior to retirement, the disabled, and other qualified persons of the McCall area, the City of McCall adopted the following Community Housing Policy (Resolution 05-19) on September 22, 2005:

1. Responsibility
 - 1.1. The City of McCall is responsible for developing and implementing a community housing program to meet the needs of its citizens.
 - 1.2. The City of McCall will develop and implement this program in partnership with other local, state, and federal agencies.
 - 1.3. The City of McCall will regularly refine its community housing policy to reflect new information and changing market conditions.
2. Seasonal/Year Round Housing Mix

- 2.1. McCall's Community Housing Program will be designed and implemented to maintain the ratio (60/40) of seasonally-occupied homes to year round primary residences as the community grows.
3. Intended Beneficiaries
 - 3.1. McCall's Community Housing Program will be designed to benefit:
 - 3.1.1. Low, moderate, and middle income families
 - 3.1.2. Local workers
 - 3.1.3. Senior citizens
 - 3.1.4. Special needs populations
4. Income Targets
 - 4.1. The policy will develop housing targeted to meet the needs of the following household types:
 - 4.1.1. Low Income – 50% of median income
 - 4.1.2. Moderate Income – 80% of median income
 - 4.1.3. Middle Income – 160% of median income
5. Job/Housing Relationship
 - 5.1. Community housing will be developed primarily for people with jobs in the community.
 - 5.2. McCall will house at least 50 percent of its workforce within city limits.
6. Production Goals
 - 6.1. To keep up with demand and eliminate our community housing backlog within ten years, McCall is committed to providing:
 - 6.1.1. 43 additional low to moderate income homes annually
 - 6.1.2. 22 additional moderate to middle income homes annually
 - 6.1.3. Senior and special needs housing in quantities to be determined
7. Ownership/Rental Mix
 - 7.1. McCall will develop community housing to maintain at least 65 percent owner occupied housing within the year round resident community.
8. Location/Unit Type
 - 8.1. Community housing requirements for new development will be met within the geographic boundaries of new development to the extent possible.
 - 8.2. Mixed use projects will be encouraged to incorporate community housing into commercial and industrial areas.
 - 8.3. Public community housing resources will focus on infill and redevelopment to:
 - 8.3.1. Maintain and enhance existing neighborhoods;
 - 8.3.2. Promote a jobs-housing balance;
 - 8.3.3. Reduce reliance on the automobile; and
 - 8.3.4. Promote smart growth principals and reduce sprawl.
9. Design and Quality
 - 9.1. Community housing is civic architecture and reflects the values of the community.
 - 9.2. Community housing should be designed to fit its context.
 - 9.3. Design within budget is a characteristic of good design; and

WHEREAS, Resolution 05-19 directs staff to develop ordinances to implement the Community Housing Policy for consideration by the Planning & Zoning Commission and the City Council, including an Inclusionary Housing Ordinance; and

WHEREAS, 24% of the City's households have incomes between 100% and 160% of the area median income, and these households can no longer afford housing in McCall; and

WHEREAS, the best available data indicates that the average price of a home for sale in McCall currently exceeds \$300,000; and

WHEREAS, the best available data indicates that the growth of the area as a resort community will continue to fuel rising housing prices while concurrently increasing the demand for a workforce that can not afford housing; and

WHEREAS, the best available data indicates that approximately 15% of the families currently residing in McCall have sufficient income to afford the mortgage payments of a \$300,000 home; and

WHEREAS, the development and construction of residential dwelling units create the need for local employees to service and maintain the dwelling units, and the residents thereof; and

WHEREAS, some form of community housing assistance and requirements are needed to maintain a local workforce;

NOW, THEREFORE, BE IT ORDAINED BY THE MAYOR AND CITY COUNCIL OF THE CITY OF McCALL, IDAHO THAT:

SECTION 1: Title 9, McCall Zoning Code is hereby by amended by adding Section 9.7.10, Inclusionary Housing, to read as follows:

9.7.10 INCLUSIONARY HOUSING

A Twenty (20) percent of the lots and houses in all subdivisions, including condominium subdivisions, approved and platted after the adoption date of this Section shall be permanently restricted as community housing to be affordable to City of McCall households with incomes in categories III and IV as defined in subsection 2, Community Housing by Income, below.

1. Options for Providing Community Housing

An applicant for subdivision approval may propose and the City Council may approve, pursuant to the priorities and criteria established below, any of four (4) options, or combination thereof, to provide Community Housing that is required by this Section.

- a. First priority is for the applicant to build community housing on the site of the subdivision.
- b. Second priority is for the applicant to build community housing off site of the subdivision.
- c. Third priority is for the applicant to convey land for community housing.
- d. Fourth priority is for the applicant to pay a fee-in-lieu for community housing.

2. Community Housing by Income Category

Fifty (50) percent of the required community housing lots and/or housing units shall be affordable to households in each of the two (2) income categories below.

- a. Category III includes households earning more than one hundred (100) percent but not more than one hundred twenty (120) percent of the Valley County median household income.
- b. Category IV includes households earning more than one hundred twenty (120) percent but not more than one hundred sixty (160) percent of the Valley County median household income.
- c. The median household income for Valley County is derived and annually updated by the U. S. Department of Housing and Urban Development.

3. On Site Community Housing

Community housing units shall be constructed on the site of the subdivision in such a manner as to create an integrated subdivision unless the City Council finds the provision of on-site community housing is impractical by making one (1) or more of the following findings.

- a. The Inclusionary Housing Plan proposed by the applicant includes constructing on-site community housing, constructing off-site community housing, and/or land conveyance and this plan is found by City Council to be in conformance with the City of McCall Comprehensive Plan and Housing Policy.

- b. The community housing units are subject to federal and/or state financial assistance and the on-site location cannot comply with the terms and conditions of the financial assistance.
- c. The number of required community housing units results in less than one (1) housing unit.
- d. The community housing units located on-site would be incompatible with the surrounding lands because of conflicting uses, site plan design or bulk.

4. Off Site Community Housing

If the City Council finds that constructing some or all of the required on-site community housing is impractical, community housing shall be constructed off-site from the subdivision unless the City Council determines that land conveyance better achieves community housing goals. The proposed off-site location shall be suitable for community housing by complying with all of the following standards.

- a. Development of community housing at the "off-site" location will comply with the goals of the City of McCall Housing Policy.
- b. The community housing units can be designed and built in a way that is compatible with surrounding land uses.
- c. Community housing at the "off-site" location will comply with applicable Zoning and Subdivision Code requirements.
- d. The density permitted on the subdivision site may be devoted fully to free-market lots and the off-site community housing units shall be included in the total number of subdivision lots when calculating the community housing requirement.
- e. The number of community housing units constructed off-site shall be provided in an amount equal to:
 - a. 125 percent of the amount which would have been required had it been provided on-site if the off-site housing is within the city limits of the City of McCall. If only a portion of the required Community Housing is off-site, only that portion shall be subject to the 125% factor.
 - b. 150 percent of the amount which would have been required had it been provided on-site if the off-site housing is within the city limits of another municipality located in Valley or Adams County. If only a portion of the required Community Housing is off-site, only that portion shall be subject to the 150% factor.

- c. 200 percent of the amount which would have been required had it been provided on-site if the off-site housing is within unincorporated Valley or Adams County. If only a portion of the required Community Housing is off-site, only that portion shall be subject to the 200% factor.

5. Land Conveyance

If the City Council finds it is impractical to construct on-site community housing and determines a land conveyance for community housing better serves the City's community housing goals than the construction of off-site community housing, the conveyance of land for community housing may be accepted pursuant to the following standards.

- a. The land shall provide for community housing in appropriate locations by complying with the following.
 - 1) Community housing on the land shall comply with the goals of the City of McCall Housing Policy.
 - 2) The land shall be near existing or planned employment centers, schools and commercial services.
 - 3) Housing on the site shall comply with applicable Zoning and Subdivision Code requirements.
 - 4) Notwithstanding this subsection, the Council may accept land that does not meet these criteria if the sale of the land is anticipated pursuant to subsection e, below.
- b. The fair market value of the land shall equal the total subsidy amount for the number of required community housing units as calculated in Section 9.7.10.A.4.e as the subsidy amount is calculated by the City Community Development Director pursuant to the Community Housing Guidelines, as amended.
 - 1) A professional real estate appraiser licensed to practice in Idaho shall establish the fair market value of the land to be conveyed.
 - 2) Fair market value shall be established on a preliminary basis at the time the Inclusionary Housing Plan (subsection 9.0 below) is reviewed.

- 3) Fair market value shall be confirmed at the time of review and approval of the final subdivision plat for the free market portion of the subdivision.
 - 4) Fair market value shall be net of any customary real estate commissions for the sale of the land.
- c. The land conveyance shall occur prior to the City signing the final plat verifying subdivision approval, unless the City Council approves other arrangements with financial assurances.
 - d. The land conveyed shall be used for the development of community housing units or conveyed pursuant to subsection e, below.
 - e. The City Council is permitted to sell land conveyed for community housing if:
 - 1) All proceeds from the sale of the land are placed in the Community Housing Trust Account (subsection 11.0 below); and,
 - 2) The proceeds from the sale of the land and any interest accrued thereon are used only for subsidizing or constructing community housing within a reasonable period of time.

6. In Lieu Fee

The City Council shall accept an in lieu fee for any fraction of a required community housing unit. The fee shall be calculated and collected pursuant to the following standards.

- a. The fee shall be calculated by averaging the subsidy amounts for providing a community housing unit in each of the two (2) Income Categories III and IV. The fee amount shall be proportionate to the fraction of the community housing unit required. The subsidy amounts for each Income Category shall be calculated by the Community Development Director pursuant to the Community Housing Guidelines, as amended.
- b. Prior to September 30, 2006, and on or before September 30 of each following year, the subsidy amount used in the in lieu fee calculation shall be evaluated by the Community Development Director, and if necessary, adjusted to reflect current land and construction costs and the current median income.

- c. The in lieu fee shall be paid prior to the City signing the final plat verifying subdivision approval, unless the City Council approves other arrangements with financial assurances. In lieu fees shall be deposited into a separate account pursuant to subsection 11, Community Housing Trust Account.

7. Deed Restrictions

The lots and houses for community housing shall be permanently deed restricted as to the initial and resale price, minimum size and construction standards, and qualifications of buyers and renters, pursuant to the Community Housing Guidelines, as amended. Provided however, if within nine (9) months after a community housing unit is first available for sale there are no qualified purchasers of the unit, the City Council shall, upon request of the developer, remove the community housing deed restrictions and the unit may be sold by the developer at a market price.

As an alternative to permanent deed restriction, an applicant may request that up to twenty five (25) percent of the lots and houses be subject to an "Equity-Builder" program pursuant to the Community Housing Guidelines.

8. Timing of Occupancy

All community housing units shall be ready for occupancy, or their construction costs bonded and a specific timeline approved by the City Council, no later than the date of the initial occupancy of the free-market portion of the residential subdivision for which the community housing is required. If the subdivision is approved for phased development, the community housing units may be constructed, or bonded with an approved timeline, in proportion to the phases of the subdivision.

9. Inclusionary Housing Plan

An applicant for subdivision approval shall submit an Inclusionary Housing Plan concurrently with the initial application submittal for the subdivision. The Inclusionary Housing Plan shall be prepared and reviewed pursuant to the following standards.

- a. The Inclusionary Housing Plan shall include the following:

- 1) The calculation of the number of community housing units required.
- 2) The proposed method of providing community housing (on-site, off-site, conveyance of land and/or payment of an in lieu fee) and the appropriate justification.
- 3) If community housing units are to be constructed, the Plan shall include:
 - (a) A conceptual site plan and building floor plan illustrating the number of community housing units proposed their location in relation to the other development on the site and surrounding land uses, and the number and size of bedrooms and square footage of each unit.
 - (b) A tabular summary of the number of community housing units, the number and size of bedrooms of each unit, the rental/sale mix, and the sales price or rent for each unit.
 - (c) The proposed restrictions to be placed on the community housing units to ensure they remain affordable and comply with the Community Housing Guidelines, as amended.
- 4) If payment of an in lieu fee is proposed, the Plan shall include the amount of the fee to be paid and the supporting calculations.
- 5) If land is to be conveyed, the Plan shall include:
 - (a) A survey depicting the location, size and topography of the land proposed for conveyance.
 - (b) A title report demonstrating clear title, physical and legal access, liens, easements, and other information necessary to fully describe the legal status of the property.
 - (c) Verification that conditions of the land, any restrictions on title to the land (such as covenants and easements) and the applicable Land Use Codes allow the development of residential units on the land, and that the site generally can be developed for community housing.

- (d) An appraisal of the fair market value of the land.
- (e) Any additional information or studies determined by the Community Development Director to be necessary to verify the suitability of the land for development.

6) Community Housing Agreement

The agreement by a developer to implement the Plan shall be established in a Community Housing Agreement. The Agreement shall be in a form approved by the City Attorney and shall include the following:

- (a) If the Plan proposes the construction of community housing units, the Agreement shall identify: the location, number, type and size of community housing units to be constructed; sales and/or rental terms; occupancy requirements; a timetable for completion of the units; construction specifications; and the restrictions to be placed on the units to ensure their permanent affordability and compliance with the Community Housing Guidelines, as amended.
- (b) If the Plan proposes the conveyance of land, the Agreement shall identify the land to be conveyed, its fair market value, and the time at which the land will be conveyed to the City.
- (c) If the Plan proposes the payment of an in lieu fee, the Agreement shall identify the amount of the fee to be paid, and the time of payment.
- (d) If the Plan proposes a combination of methods (construction of units, conveyance of land, or in lieu fee), the Agreement shall identify the appropriate provisions for each method of mitigation.

b. Review of the Inclusionary Housing Plan

- 1) The procedures for review of the Inclusionary Housing Plan shall be the same as for the subdivision application with which it is submitted.
- 2) The Plan shall be approved, approved with conditions, or disapproved by the Planning & Zoning Commission and the City Council, based on the standards of this Section. A decision on the Plan shall be made prior to a decision on

the residential subdivision with which it is submitted. A subdivision plat shall not be approved without an Inclusionary Housing Plan approved pursuant to the procedures and standards of this Section.

- 3) An approved Inclusionary Housing Plan may be amended or modified only in accordance with the procedures and standards established for its original approval.

10. Community Housing Guidelines

The construction and occupancy of all community housing units shall comply with the Community Housing Guidelines, as amended from time to time by the City Council. If any conflict should arise between the Community Housing Guidelines and this Ordinance, the provisions contained in this Ordinance shall control.

- a. All community housing units constructed pursuant to this Section shall comply with the sales and/or rental terms, appreciation rates, housing type, and occupancy requirements of the Community Housing Guidelines, as amended.
- b. All community housing units shall comply with the size, materials and design requirements and construction standards of the Community Housing Guidelines, as amended.
- c. All community housing units shall comply with all other requirements of the Community Housing Guidelines, as amended, to ensure they are maintained, occupied and owned/rented as community housing units.

11. Community Housing Trust Account

- a. For the purpose of ensuring that any fees collected pursuant to this section are spent for community housing and consequently benefit the fee payers, an interest-bearing Community Housing Trust Account shall be established.
- b. All fees collected pursuant to this section shall be immediately deposited into the Community Housing Trust Account.
- c. All proceeds in the Community Housing Trust Account not immediately necessary for expenditure shall be invested in an interest-bearing account. All income derived from these investments shall be retained in the trust account until spent or refunded.

- d. All funds deposited into the Community Housing Trust Account and accrued interest shall be expended only for the purposes of planning, subsidizing or developing community housing units in McCall.

12. Refund of In Lieu Fee

- a. A fee collected pursuant to this section and three (3) percent interest compounded annually, shall be returned upon written request, to the developer of the subdivision for which a fee was paid if the fee has not been obligated within five (5) years from the date the fee was paid. Notwithstanding, if the City Council has earmarked the funds for expenditure on a specific community housing project, the Council may extend the time period by up to five (5) additional years.
- b. To obtain the refund, the developer must submit a written request to the Community Development Director within one (1) year from the end of the fifth (5th) year from the date payment was received, or within one (1) year from the end of the time this refund requirement is extended by the City Council. Said request shall be accompanied by proof of ownership of the property at the time the refund is requested or contract or option to purchase at the time the refund is requested, and a copy of the receipt verifying payment of the fee.
- c. For the purpose of this Section, fee payments shall be deemed spent in the order in which they are paid. The first (1st) payment made shall be the first (1st) payment spent.

13. Adjustments

- a. The requirements of this section 9.7.10 may be adjusted or waived by the City Council if the developer demonstrates and the Council finds that there is no reasonable relationship between the housing impact of the proposed residential subdivision and the requirements of this section.
- b. The developer shall have the burden of providing economic information or other data and evidence necessary to establish that the housing impact of the proposed residential subdivision has no reasonable relationship to the requirements of this chapter.
- c. The developer must make said demonstration concurrently with the first submittal of an application for the residential subdivision.

- d. The City Council shall make the determination to adjust or maintain the requirements of this section concurrently with the initial decision to approve or deny the proposed residential subdivision.

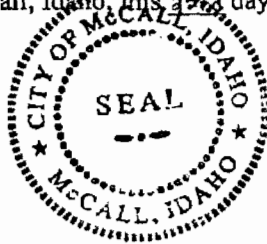
SECTION 2 Severability.

In the event that any court of competent jurisdiction enters its judgment or order declaring any portion of Section 9.7.10 to be invalid, then such judgment shall only affect that portion of the ordinance so adjudicated, and all other remaining portions shall remain in full force and effect.

EFFECTIVE DATE

Regularly passed, approved and adopted by the Mayor and City Council of the City of McCall, Idaho, this 4th day of February, 2006.

(seal)



Walt
Mayor

ATTEST:

Joanne E. York
City Clerk

**A SUMMARY OF ORDINANCE NO. 819
PASSED BY THE CITY OF McCALL, IDAHO**

AN ORDINANCE OF THE CITY OF McCALL, IDAHO AMENDING THE CITY OF McCALL SUBDIVISION AND DEVELOPMENT CODE, TITLE 9 TO REQUIRE ALL NEW SUBDIVISIONS TO INCLUDE A CERTAIN NUMBER OF COMMUNITY HOUSING UNITS TO BE AFFORDABLE TO THE CITY'S WORKFORCE.

The principal provisions of Title 9 by adding Section 9.7.10, Inclusionary Housing, requires as follows:

- Provides for Inclusionary Housing, which provides for at least twenty percent of the housing to be affordable community housing and provides options for providing the community housing.
- Provides for Community Housing by Income Category, which requires that a minimum of twelve (12) percent of the community housing lots and/or housing units to be affordable.
- Provides for a Community Housing On Site section.
- Provides for a Community Housing Off Site section.
- Provides for a Land Conveyance section.
- Provides for a Fee In Lieu section, which provides that a fee shall be calculated and collected according to certain standards.
- Provides for a Deed Restriction section and includes a provision for a nine (9) month period if within this time period there are no qualified buyers of the unit that the City Council may remove the community housing deed restrictions.
- Provides for a Timing of Occupancy section.
- Provides for an Inclusionary Housing Plan that provides for calculation of the number of housing units required and review of the inclusionary housing plan.
- Provides for a Community Housing Guidelines section.
- Provides for a Community Housing Trust Account section to ensure the fees collected benefit the fee payers; that the fees are deposited into the trust account, and to allow for an interest-bearing account and for accrued interest.
- Provides for a Refund of In Lieu Fee section.
- Provides for an Adjustments section.

The Ordinance shall be effective upon publication of this Summary.

The full text of the Ordinance is available for review at City Hall and will be provided by the City Clerk to any citizen upon personal request. The full text is also available online at www.mccall.id.us.

APPROVED BY THE COUNCIL OF THE CITY OF McCALL, IDAHO, THIS 9th DAY OF March, 2006.



Approved:

By: W. White
Mayor

Attest:

By: Joanne E. York
City Clerk

msgW:\Work\M\McCall, City of 21684\2006 Ordinances\Sum Ord Inclusionary Housing Title 9 Subdiv & Devlpmt Code 03 01 06.doc

EXHIBIT “E”
FIRST AMENDMENT TO
DEVELOPMENT AGREEMENT,
ALPINE VILLAGE PLANNED
UNIT DEVELOPMENT

EXHIBIT "E"

Instrument: 334281
VALLEY COU . ASCADE, IDAHO
8-20-2008 12:15:34 No. of Pages: 4
Recorded for: CITY OF MCCALL
ARCHIE N. BANBURY Fee: 0.00
Ex-Officio Recorder Deputy
Index to: MISCELLANEOUS RECORD

Recording Requested By and
When Recorded Return to:

City Clerk
City of McCall
216 East Park Street
McCall, Idaho 83638

For Recording Purposes Do
Not Write Above This Line

FIRST AMENDMENT TO DEVELOPMENT AGREEMENT ALPINE VILLAGE PLANNED UNIT DEVELOPMENT

This First Amendment to Development Agreement (the "First Amendment") is entered into effective this 24 day of July, 2008, by and between the City of McCall, a municipal corporation of the State of Idaho, hereinafter referred to as the "City", and Alpine Village Company, hereinafter referred to as "Alpine Village", whose address is 1101 W. River Street, Suite 300, Boise, Idaho, 83702, and who is the owner of the Alpine Village Planned Unit Development (the "PUD"), as the same is platted of record with Valley County, Idaho.

WHEREAS, the City and Alpine Village entered into Development Agreements recorded January 1, 2008, as Instrument No. 328801, and recorded February 2, 2008, as Instrument No. 329168, said Agreements are superseded and replaced in their entirety by that certain Development Agreement, which was filed of record with the Office of Recorder of Valley County, Idaho on April 7, 2008, as Instrument No. 330524 (the "Agreement").

WHEREAS, the Agreement included a Community Housing Plan and contained provisions requiring Alpine Village to provide Community Housing pursuant to McCall City Ordinance No. 819 (the "Ordinance").

WHEREAS, the Ordinance has been declared void by means of that certain Memorandum Decision and Order Granting Plaintiff's Motion for Summary Judgment, which was rendered by the District Court of the Fourth Judicial District of the State of Idaho in Valley County Case No. CV 2006-490-C.

WHEREAS, the Ordinance has been repealed by the City.

WHEREAS, the parties have agreed that the Agreement should be amended to eliminate the Community Housing Plan and any requirements that Alpine Village provide Community Housing Units. The 8 Units approved as Community Housing Units can be sold as Market Rate Units.

WHEREFORE, the City of McCall and the Alpine Village do agree to amend and modify the Agreement, as follows:

1. Community Housing.

Article VII of the Agreement shall be deleted in its entirety and Alpine Village shall be and hereby is released from any requirement to provide Community Housing for or related to the PUD. Exhibit "B" to the Agreement is deleted in its entirety.

2. Continuing Effect of the Agreement.

Except as expressly modified by the terms of this First Amendment, the Agreement shall remain fully in force and binding on the parties according to its terms.

3. Miscellaneous.

After its execution, this First Amendment shall be recorded in the office of the Valley County Recorder, at the expense of Alpine Village. Each commitment and covenant contained in this First Amendment shall constitute a burden on, shall be appurtenant to, and shall run with the PUD Property. This First Amendment shall be binding on the City and Alpine Village and their respective heirs, administrators, executors, agents, legal representatives, successors and assigns.

IN WITNESS WHEREOF, the parties have hereunto caused this First Amendment to be executed, effective on the day and year first above written.

ALPINE VILLAGE COMPANY

By:

Michael B. Hormaechea
Michael B. Hormaechea, President

CITY OF MCCALL

By:

Norbert Kulesza
Norbert Kulesza, Mayor

ATTEST:

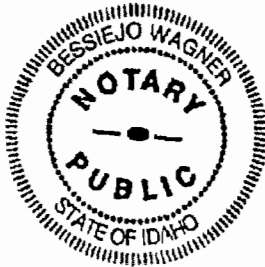
By:

Brenna Chaloupka
Brenna Chaloupka, Acting City Clerk

STATE OF IDAHO,)
 (ss.
County of Valley.)

On this 24 day of July, 2008, before me, Bessie Jo Wagner, a
Notary Public in and for said State, personally appeared Norbert Kulesza
known or identified to me to be the **Mayor of the City of McCall**, who executed the said
instrument, and acknowledged to me that said municipality executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal,
the day and year in this certificate first above written.

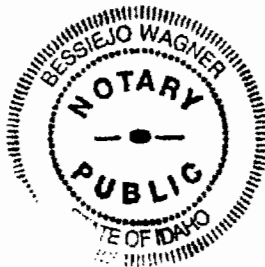


Bessie Jo Wagner
NOTARY PUBLIC FOR IDAHO
My Commission Expires: 5/21/14

STATE OF IDAHO,)
 (ss.
County of Valley.)

On this 30 day of July, 2008, before me, Bessie Jo Wagner, a
Notary Public in and for said State, personally appeared Brenna Chabupka,
known or identified to me to be the **Acting City Clerk of the City of McCall**, who executed the
said instrument, and acknowledged to me that said municipality executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal,
the day and year in this certificate first above written.



Bessie Jo Wagner
NOTARY PUBLIC FOR IDAHO
My Commission Expires: 5/21/14

STATE OF IDAHO,)
 (ss
County of Valley.)

On this 6th day of June, 2008, before me, Deanna Schneider, a
Notary Public in and for said State, personally appeared **Michael B. Hormaechea**, President of
ALPINE VILLAGE COMPANY, known or identified to me to be the person whose name is
subscribed to the within instrument and acknowledged to me that he executed the same for and on
behalf of said Limited Liability Company.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the
day and year in this certificate first above written.



Deanna Schneider
NOTARY PUBLIC FOR IDAHO
My Commission Expires: 8-20-2013

ARCHIE N. HANBURY, CLERK
BY [Signature] DEPUTY

MAY 23 2011

Case No. _____ Inst. No. _____
Filed 952 A.M. _____ P.M.

STEVEN J. MILLEMANN, ISB NO. 2601
GREGORY C. PITTENGER, ISB NO. 1828
MILLEMANN, PITTENGER, McMAHAN & PEMBERTON, LLP
ATTORNEYS AT LAW
706 NORTH FIRST STREET
POST OFFICE BOX 1066
McCALL, IDAHO 83638
TELEPHONE: (208) 634-7641
FACSIMILE: (208) 634-4516
EMAIL: sjm@mpmplaw.com
gcp@mpmplaw.com

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

ALPINE VILLAGE COMPANY,
an Idaho Corporation,

Plaintiff,

v.

CITY OF MCCALL,
a municipal corporation,

Defendant.

CASE NO. CV-2010-519C

VERIFIED AMENDED COMPLAINT

COMES NOW the above named Plaintiff, Alpine Village Company, an Idaho Corporation and for its cause of action against the City of McCall (hereinafter "City or "McCall"), complains and alleges as follows:

PARTIES

1. Plaintiff is an Idaho corporation which at all times material hereto was the developer and owner of the Alpine Village Planned Unit Development (hereinafter "Alpine Village") which is located in McCall, Valley County, Idaho. Plaintiff is also the owner of the Timbers Condominiums (the "Timbers") which is located in McCall, Valley County, Idaho.

2. Defendant City of McCall is a municipal corporation of the State of Idaho.

JURISDICTION AND VENUE

3. Jurisdiction and venue are proper in this Court as Defendant is situated in Valley County and Plaintiff is seeking damages in excess of Ten Thousand Dollars (\$10,000).

NATURE OF ACTION

4. This is a civil action seeking damages for actions of the City which constitute an unlawful taking of Plaintiff's property in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States and Article I, Section 14 of the Idaho Constitution.

FACTS

5. Plaintiff acquired property located in downtown McCall for the purpose of developing a mixed use development. Plaintiff's said property is the site of Alpine Village.

6. On February 23, 2006, McCall adopted Ordinance No. 819 (hereinafter "Ordinance 819" or "Inclusionary Housing Ordinance").

7. Ordinance 819 required that twenty (20) percent of the lots and houses in all new residential subdivisions, including condominium projects, be permanently restricted as community housing units to be affordable to City of McCall households with incomes in certain defined categories. A true and accurate copy of Ordinance 819 is attached hereto as "**Exhibit A**".

8. Ordinance 819 required any applicant seeking the City's approval of a new residential subdivision or condominium project to submit an Inclusionary Housing Plan (a.k.a. Community Housing Plan) with the initial subdivision application. The Plan was required to demonstrate the applicant's proposed method of providing the community housing which was required by Ordinance 819.

9. Ordinance 819 provided four ways by which an applicant could satisfy the community housing requirements of the Ordinance: 1) construct the community housing units on the site of the proposed subdivision; 2) construct the community housing units off-site from the subdivision; 3) convey land to the City equal in value to the total amount of the required number of community housing units, or 4) pay a fee to the city in lieu of providing either finished units or land. Options 1 and 2 required that the units be permanently deed restricted both as to price and the allowable income levels of buyers and owners.

10. On June 20, 2006, Plaintiff submitted the applications to the City which were required by the McCall City Code for preliminary approval of the Alpine Village project. These

included applications for Preliminary Plat Approval, for Planned Unit Development Preliminary Plan Approval, for a Conditional Use Permit, for Scenic Route Approval and for Amendment of the McCall Zoning Map (hereinafter the "Preliminary Applications"). The project is a multi-phase planned unit development with a mix of residential, retail and commercial condominium units. As required by Ordinance 819, a Community Housing Plan was submitted with the Preliminary Applications. The Preliminary Applications were accepted by the City, which then commenced its review and public hearing process.

11. On September 22, 2006, a lawsuit was filed by the Mountain Central Board of Realtors, Inc., against the City of McCall, (Valley County Case No. CV-2006-490C) seeking to overturn Ordinance 819. The filing of the lawsuit did not interrupt or impact the City's processing of the Alpine Village Preliminary Applications.

12. On October 3, 2006, the McCall Planning and Zoning Commission recommended approval of all of the Alpine Village Preliminary Applications to the McCall City Council, conditioned among other things, on Plaintiff reaching agreement with the City Council on the Plaintiff's method of compliance with Ordinance 819 and reducing such agreement to a recorded "Development Agreement".

13. On December 13, 2006, the McCall City Council approved all of the Alpine Village Preliminary Applications, conditioned on Plaintiff's submittal of a Community Housing Plan, as part of a Development Agreement, demonstrating compliance with Ordinance 819, prior to final plat approval.

14. In January, 2007, Plaintiff entered into a purchase agreement to acquire the Timbers. Plaintiff agreed to purchase the Timbers solely so that Plaintiff could supply the seventeen (17) off-site community housing units which would be required to satisfy the Alpine Village community housing requirements which were imposed by Ordinance 819. Plaintiff's agreement to purchase the Timbers was contingent upon Plaintiff receiving approval from the McCall City Council for the use of the Timbers units to satisfy the off-site community housing requirements for Alpine Village under Ordinance 819.

15. On March 22, 2007, the McCall City Council approved Plaintiff's Community Housing Plan for Alpine Village, which proposed to use the Timbers units as the seventeen (17) off site community housing units for Alpine Village. This approval, and the Ordinance itself,

required that the Timbers units be deed restricted as Community Housing Units, to be offered at restricted prices to income eligible buyers, all in accordance with the Ordinance.

16. Having received the aforesaid City Council approval for the use of the Timbers units as the off-site community housing units for Alpine Village, Plaintiff closed on its purchase of the Timbers on or about April 16, 2007.

17. Subsequent to its purchase of the Timbers, plaintiff improved the Timbers in order to comply with the City's conditions of approval and to make the units marketable as owned or rented community housing units.

18. On May 25, 2007, Plaintiff submitted its applications for Final Plat and Final PUD Plan approval for Phase 1 of Alpine Village (hereinafter the "Final Applications"). In satisfaction of the aforesaid City Council conditions of approval of the Preliminary Applications, Plaintiff submitted a proposed Development Agreement which incorporated the previously approved Community Housing Plan for Alpine Village, dedicating the seventeen (17) Timbers units as off-site community housing units for Alpine Village.

19. On August 23, 2007, the McCall City Council approved Plaintiff's Final Applications.

20. On December 13, 2007, Plaintiff and the City executed the Alpine Village Development Agreement. The Development Agreement confirmed Plaintiff's Community Housing Plan for Alpine Village, which was appended to the Development Agreement as Exhibit B. The Development Agreement was filed of record with the Office of Recorder of Valley County on January 28, 2008. A true and accurate copy of the Alpine Village Development Agreement is attached hereto as "**Exhibit B**".

21. On February 19, 2008, the District Court entered its Memorandum Decision and Order in Mountain Central Board of Realtors, Inc. v. City of McCall. The court held that Ordinance 819 was void and without force or effect. The City of McCall did not appeal the decision. A true and accurate copy of the Decision is attached hereto as "**Exhibit C**".

22. On April 24, 2008, by means of the adoption of Ordinance 856, the City repealed Ordinance 819. A true and accurate copy of Ordinance 856 is attached hereto as "**Exhibit D**".

23. On July 24, 2008, the City and Plaintiff executed the *First Amendment to Development Agreement, Alpine Village Planned Unit Development*, which was filed of record with the Office of Recorder of Valley County, Idaho on August 8, 2008. This Amendment

released Alpine Village from any community housing requirements. A true and accurate copy of the said First Amendment to Development Agreement is attached hereto as "**Exhibit E**".

FIRST CAUSE OF ACTION

24. Paragraphs 1 through 23 are realleged and hereby incorporated by reference.

25. Plaintiff purchased the Timbers Condominiums solely to comply with the mandatory requirements of Ordinance 819, which required that Plaintiff provide deed restricted and income restricted community housing units as a condition of proceeding with the development of Plaintiff's property. But for the Ordinance, Plaintiff would not have purchased the Timbers or incurred the costs associated with the purchase of the Timbers, the remodel and improvement of the Timbers and the continued ownership of the Timbers.

26. The City's requirement that Plaintiff comply with Ordinance 819 as a mandatory precondition to Plaintiff's development of its property constituted an unlawful taking of Plaintiff's property in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

27. As a direct and proximate result of the aforesaid taking, Plaintiff has been damaged in an amount in excess of \$10,000.00, the exact amount to be determined at trial.

28. On November 15, 2010, Plaintiff delivered to the City a written demand for payment of its damages incurred as a result of the aforesaid taking. The City has declined to compensate Plaintiff for any of its said damages.

SECOND CAUSE OF ACTION

29. Paragraphs 1 through 28 are re-alleged and hereby incorporated by reference.

30. Plaintiff purchased the Timbers Condominiums solely to comply with the mandatory requirements of Ordinance 819, which required that Plaintiff provide deed restricted and income restricted community housing units as a condition of proceeding with the development of Plaintiff's property. But for the Ordinance, Plaintiff would not have purchased the Timbers or incurred the costs associated with the purchase of the Timbers, the remodel and improvement of the Timbers and the continued ownership of the Timbers.

31. The City's requirement that Plaintiff comply with Ordinance 819 as a mandatory precondition to Plaintiff's development of its property constituted an unlawful taking of Plaintiff's property in violation of Article I, Section 14 of the Idaho Constitution.

32. As a direct and proximate result of the aforesaid taking, Plaintiff has been damaged in an amount in excess of \$10,000.00, the exact amount to be determined at trial.

33. On November 15, 2010, Plaintiff delivered to the City a written demand for payment of its damages incurred as a result of the aforesaid taking. The City has declined to compensate Plaintiff for any of its said damages.

ATTORNEY FEES

34. Plaintiff is entitled to recover its attorneys fees and costs incurred in pursuing this action, pursuant to Idaho Code Sections 12-117, 12-120 and 12-121, IRCP 54(e)(1) and the Fifth and Fourteenth Amendments to the United States Constitution.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff requests that this Court enter Judgment in favor of Plaintiff and against the City as follows:

1. Declaring that the City's application of Ordinance 819 to Plaintiff as aforesaid constituted a taking of Plaintiff's property in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the Idaho Constitution;
2. Awarding Plaintiff its damages suffered as a result of the unlawful taking of its property, in an amount to be proven at trial;
3. Awarding Plaintiff its costs and attorney fees incurred in this action; and,
4. For such other relief as the Court may deem just and proper.

DATED this 23 day of May, 2011.

MILLEMANN, PITTENGER, MCMAHAN
& PEMBERTON, LLP

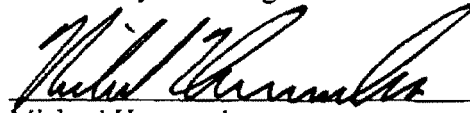
By: 
GREGORY C. PITTENGER

VERIFICATION

STATE OF IDAHO,)
)ss
County of Valley.)

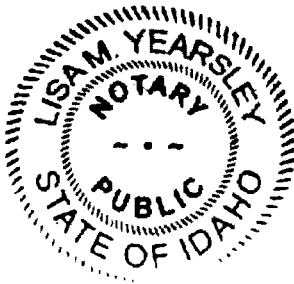
I, Michael Hormaechea, being first duly sworn upon oath depose and say:


That I am the President of Alpine Village Company, Plaintiff in the above-entitled action; that I have read the foregoing Verified Amended Complaint and acknowledge that the contents therein are true and correct to the best of my knowledge and belief.



Michael Hormaechea

SUBSCRIBED AND SWORN to before me this 19th day of May, 2011.





NOTARY PUBLIC FOR IDAHO
My Commission Expires: 2-26-2013

**EXHIBIT “A”
MCCALL
ORDINANCE NO. 819**

EXHIBIT "A"

ORDINANCE NO. 819

AN ORDINANCE OF THE CITY OF McCall, IDAHO AMENDING THE CITY OF McCall SUBDIVISION AND DEVELOPMENT REGULATIONS CODE, TITLE 9 TO REQUIRE ALL NEW SUBDIVISIONS TO INCLUDE A CERTAIN NUMBER OF COMMUNITY HOUSING UNITS TO BE AFFORDABLE TO THE CITY'S WORKFORCE, PROVIDE FOR A SEVERABILITY CLAUSE AND PROVIDE AN EFFECTIVE DATE.

WHEREAS, the Housing Component of the McCall Area Comprehensive Plan includes the following objectives:

- o Prepare for the housing impact of major development proposals and expansions on the City of McCall, its impact area, and surrounding vicinity;
- o Encourage or provide for affordable housing; and

WHEREAS, the health, safety and welfare of the citizens of the City of McCall is dependent upon a reasonable supply of affordable, deed restricted workforce housing (community housing) being made available to ensure that critical professional workers, essential service personnel, and service workers live within proximity to their work to provide municipal and private sector services; and

WHEREAS, the City of McCall has determined through public input and the comprehensive planning process that a reasonable supply of community housing is needed to promote the social and economic diversity of the City; and

WHEREAS, the economic vitality and well-being of the citizens of the City of McCall is dependent upon a reasonable supply of community housing, and that persons such as medical personnel, peace officers, emergency personnel, fire personnel, and providers of other professional services, which are vital to the community, are dependent upon the availability of community housing; and

WHEREAS, to advance these objectives the City, in partnership with Valley County, Adams County, and the communities of Cascade, Donnelly, and New Meadows, commissioned a Housing Market and Needs Assessment for Valley and Adams County (Housing Needs Assessment) that was completed July, 2005; and

WHEREAS, the Housing Needs Assessment determined that 210 community housing units are currently needed in Valley and Adams Counties, including 145 low to moderate income homes for families earning 50 to 100% of annual median income and 65 moderate to middle income homes for families earning 100 to 160% of annual median income; and

WHEREAS, the Housing Needs Assessment determined that 200 additional homes are needed in Valley and Adams Counties in the next two years, including 138 low to moderate income homes and 62 moderate to middle income homes; and

WHEREAS, the Housing Needs Assessment determined that housing is needed for the families of a significant number of the 700 to 1,000 construction workers estimated to be working in Valley and Adams Counties and commuting to their homes elsewhere, reducing the vitality of the local economy; and

WHEREAS, the Housing Needs Assessment determined that the total number of units needed to catch up with demand in Valley and Adams Counties is between 550 and 610 units of Community Housing; and

WHEREAS, the City of McCall encompasses approximately 20% of the region's population and employment; and

WHEREAS, 20% of the housing needed to catch up with demand, as identified in the Housing Needs Assessment is 110 to 122 homes, including 76 to 84 low to moderate income homes and 34 to 38 moderate to middle income homes; and

WHEREAS, the City of McCall is presently comprised of approximately 40% year round primary residences and approximately 60% seasonally-occupied homes; and

WHEREAS, the City of McCall desires to maintain the current ratio of year round primary residences to seasonally-occupied homes as the community grows; and

WHEREAS, the McCall City Council held housing policy discussions at City Council meetings on July 14, 2005 and August 11, 2005; held public information sessions on housing policy on August 20, 2005 and August 23, 2005, and held public hearings on a proposed Housing Policy on September 7, 2005 and September 22, 2005; and

WHEREAS, to assure the existence of a supply of desirable and affordable housing for persons currently employed in the McCall area, persons who were employed in the McCall area prior to retirement, the disabled, and other qualified persons of the McCall area, the City of McCall adopted the following Community Housing Policy (Resolution 05-19) on September 22, 2005:

1. Responsibility

- 1.1. The City of McCall is responsible for developing and implementing a community housing program to meet the needs of its citizens.
- 1.2. The City of McCall will develop and implement this program in partnership with other local, state, and federal agencies.
- 1.3. The City of McCall will regularly refine its community housing policy to reflect new information and changing market conditions.

2. Seasonal/Year Round Housing Mix

- 2.1. McCall's Community Housing Program will be designed and implemented to maintain the ratio (60/40) of seasonally-occupied homes to year round primary residences as the community grows.
3. Intended Beneficiaries
 - 3.1. McCall's Community Housing Program will be designed to benefit:
 - 3.1.1. Low, moderate, and middle income families
 - 3.1.2. Local workers
 - 3.1.3. Senior citizens
 - 3.1.4. Special needs populations
4. Income Targets
 - 4.1. The policy will develop housing targeted to meet the needs of the following household types:
 - 4.1.1. Low Income – 50% of median income
 - 4.1.2. Moderate Income – 80% of median income
 - 4.1.3. Middle Income – 160% of median income
5. Job/Housing Relationship
 - 5.1. Community housing will be developed primarily for people with jobs in the community.
 - 5.2. McCall will house at least 50 percent of its workforce within city limits.
6. Production Goals
 - 6.1. To keep up with demand and eliminate our community housing backlog within ten years, McCall is committed to providing:
 - 6.1.1. 43 additional low to moderate income homes annually
 - 6.1.2. 22 additional moderate to middle income homes annually
 - 6.1.3. Senior and special needs housing in quantities to be determined
7. Ownership/Rental Mix
 - 7.1. McCall will develop community housing to maintain at least 65 percent owner occupied housing within the year round resident community.
8. Location/Unit Type
 - 8.1. Community housing requirements for new development will be met within the geographic boundaries of new development to the extent possible.
 - 8.2. Mixed use projects will be encouraged to incorporate community housing into commercial and industrial areas.
 - 8.3. Public community housing resources will focus on infill and redevelopment to:
 - 8.3.1. Maintain and enhance existing neighborhoods;
 - 8.3.2. Promote a jobs-housing balance;
 - 8.3.3. Reduce reliance on the automobile; and
 - 8.3.4. Promote smart growth principals and reduce sprawl.
9. Design and Quality
 - 9.1. Community housing is civic architecture and reflects the values of the community.
 - 9.2. Community housing should be designed to fit its context.
 - 9.3. Design within budget is a characteristic of good design; and

WHEREAS, Resolution 05-19 directs staff to develop ordinances to implement the Community Housing Policy for consideration by the Planning & Zoning Commission and the City Council, including an Inclusionary Housing Ordinance; and

WHEREAS, 24% of the City's households have incomes between 100% and 160% of the area median income, and these households can no longer afford housing in McCall; and

WHEREAS, the best available data indicates that the average price of a home for sale in McCall currently exceeds \$300,000; and

WHEREAS, the best available data indicates that the growth of the area as a resort community will continue to fuel rising housing prices while concurrently increasing the demand for a workforce that can not afford housing; and

WHEREAS, the best available data indicates that approximately 15% of the families currently residing in McCall have sufficient income to afford the mortgage payments of a \$300,000 home; and

WHEREAS, the development and construction of residential dwelling units create the need for local employees to service and maintain the dwelling units, and the residents thereof; and

WHEREAS, some form of community housing assistance and requirements are needed to maintain a local workforce;

NOW, THEREFORE, BE IT ORDAINED BY THE MAYOR AND CITY COUNCIL OF THE CITY OF McCALL, IDAHO THAT:

SECTION 1: Title 9, McCall Zoning Code is hereby by amended by adding Section 9.7.10, Inclusionary Housing, to read as follows:

9.7.10 INCLUSIONARY HOUSING

A Twenty (20) percent of the lots and houses in all subdivisions, including condominium subdivisions, approved and platted after the adoption date of this Section shall be permanently restricted as community housing to be affordable to City of McCall households with incomes in categories III and IV as defined in subsection 2, Community Housing by Income, below.

1. Options for Providing Community Housing

An applicant for subdivision approval may propose and the City Council may approve, pursuant to the priorities and criteria established below, any of four (4) options, or combination thereof, to provide Community Housing that is required by this Section.

- a. First priority is for the applicant to build community housing on the site of the subdivision.
- b. Second priority is for the applicant to build community housing off site of the subdivision.
- c. Third priority is for the applicant to convey land for community housing.
- d. Fourth priority is for the applicant to pay a fee-in-lieu for community housing.

2. Community Housing by Income Category

Fifty (50) percent of the required community housing lots and/or housing units shall be affordable to households in each of the two (2) income categories below.

- a. Category III includes households earning more than one hundred (100) percent but not more than one hundred twenty (120) percent of the Valley County median household income.
- b. Category IV includes households earning more than one hundred twenty (120) percent but not more than one hundred sixty (160) percent of the Valley County median household income.
- c. The median household income for Valley County is derived and annually updated by the U. S. Department of Housing and Urban Development.

3. On Site Community Housing

Community housing units shall be constructed on the site of the subdivision in such a manner as to create an integrated subdivision unless the City Council finds the provision of on-site community housing is impractical by making one (1) or more of the following findings.

- a. The Inclusionary Housing Plan proposed by the applicant includes constructing on-site community housing, constructing off-site community housing, and/or land conveyance and this plan is found by City Council to be in conformance with the City of McCall Comprehensive Plan and Housing Policy.

- b. The community housing units are subject to federal and/or state financial assistance and the on-site location cannot comply with the terms and conditions of the financial assistance.
- c. The number of required community housing units results in less than one (1) housing unit.
- d. The community housing units located on-site would be incompatible with the surrounding lands because of conflicting uses, site plan design or bulk.

4. Off Site Community Housing

If the City Council finds that constructing some or all of the required on-site community housing is impractical, community housing shall be constructed off-site from the subdivision unless the City Council determines that land conveyance better achieves community housing goals. The proposed off-site location shall be suitable for community housing by complying with all of the following standards.

- a. Development of community housing at the "off-site" location will comply with the goals of the City of McCall Housing Policy.
- b. The community housing units can be designed and built in a way that is compatible with surrounding land uses.
- c. Community housing at the "off-site" location will comply with applicable Zoning and Subdivision Code requirements.
- d. The density permitted on the subdivision site may be devoted fully to free-market lots and the off-site community housing units shall be included in the total number of subdivision lots when calculating the community housing requirement.
- e. The number of community housing units constructed off-site shall be provided in an amount equal to:
 - a. 125 percent of the amount which would have been required had it been provided on-site if the off-site housing is within the city limits of the City of McCall. If only a portion of the required Community Housing is off-site, only that portion shall be subject to the 125% factor.
 - b. 150 percent of the amount which would have been required had it been provided on-site if the off-site housing is within the city limits of another municipality located in Valley or Adams County. If only a portion of the required Community Housing is off-site, only that portion shall be subject to the 150% factor.

- c. 200 percent of the amount which would have been required had it been provided on-site if the off-site housing is within unincorporated Valley or Adams County. If only a portion of the required Community Housing is off-site, only that portion shall be subject to the 200% factor.

5. Land Conveyance

If the City Council finds it is impractical to construct on-site community housing and determines a land conveyance for community housing better serves the City's community housing goals than the construction of off-site community housing, the conveyance of land for community housing may be accepted pursuant to the following standards.

- a. The land shall provide for community housing in appropriate locations by complying with the following.
 - 1) Community housing on the land shall comply with the goals of the City of McCall Housing Policy.
 - 2) The land shall be near existing or planned employment centers, schools and commercial services.
 - 3) Housing on the site shall comply with applicable Zoning and Subdivision Code requirements.
 - 4) Notwithstanding this subsection, the Council may accept land that does not meet these criteria if the sale of the land is anticipated pursuant to subsection e, below.
- b. The fair market value of the land shall equal the total subsidy amount for the number of required community housing units as calculated in Section 9.7.10.A.4.e as the subsidy amount is calculated by the City Community Development Director pursuant to the Community Housing Guidelines, as amended.
 - 1) A professional real estate appraiser licensed to practice in Idaho shall establish the fair market value of the land to be conveyed.
 - 2) Fair market value shall be established on a preliminary basis at the time the Inclusionary Housing Plan (subsection 9.0 below) is reviewed.

- 3) Fair market value shall be confirmed at the time of review and approval of the final subdivision plat for the free market portion of the subdivision.
 - 4) Fair market value shall be net of any customary real estate commissions for the sale of the land.
- c. The land conveyance shall occur prior to the City signing the final plat verifying subdivision approval, unless the City Council approves other arrangements with financial assurances.
 - d. The land conveyed shall be used for the development of community housing units or conveyed pursuant to subsection e, below.
 - e. The City Council is permitted to sell land conveyed for community housing if:
 - 1) All proceeds from the sale of the land are placed in the Community Housing Trust Account (subsection 11.0 below); and,
 - 2) The proceeds from the sale of the land and any interest accrued thereon are used only for subsidizing or constructing community housing within a reasonable period of time.

6. In Lieu Fee

The City Council shall accept an in lieu fee for any fraction of a required community housing unit. The fee shall be calculated and collected pursuant to the following standards.

- a. The fee shall be calculated by averaging the subsidy amounts for providing a community housing unit in each of the two (2) Income Categories III and IV. The fee amount shall be proportionate to the fraction of the community housing unit required. The subsidy amounts for each Income Category shall be calculated by the Community Development Director pursuant to the Community Housing Guidelines, as amended.
- b. Prior to September 30, 2006, and on or before September 30 of each following year, the subsidy amount used in the in lieu fee calculation shall be evaluated by the Community Development Director, and if necessary, adjusted to reflect current land and construction costs and the current median income.

- c. The in lieu fee shall be paid prior to the City signing the final plat verifying subdivision approval, unless the City Council approves other arrangements with financial assurances. In lieu fees shall be deposited into a separate account pursuant to subsection 11, Community Housing Trust Account.

7. Deed Restrictions

The lots and houses for community housing shall be permanently deed restricted as to the initial and resale price, minimum size and construction standards, and qualifications of buyers and renters, pursuant to the Community Housing Guidelines, as amended. Provided however, if within nine (9) months after a community housing unit is first available for sale there are no qualified purchasers of the unit, the City Council shall, upon request of the developer, remove the community housing deed restrictions and the unit may be sold by the developer at a market price.

As an alternative to permanent deed restriction, an applicant may request that up to twenty five (25) percent of the lots and houses be subject to an "Equity-Builder" program pursuant to the Community Housing Guidelines.

8. Timing of Occupancy

All community housing units shall be ready for occupancy, or their construction costs bonded and a specific timeline approved by the City Council, no later than the date of the initial occupancy of the free-market portion of the residential subdivision for which the community housing is required. If the subdivision is approved for phased development, the community housing units may be constructed, or bonded with an approved timeline, in proportion to the phases of the subdivision.

9. Inclusionary Housing Plan

An applicant for subdivision approval shall submit an Inclusionary Housing Plan concurrently with the initial application submittal for the subdivision. The Inclusionary Housing Plan shall be prepared and reviewed pursuant to the following standards.

- a. The Inclusionary Housing Plan shall include the following:

- 1) The calculation of the number of community housing units required.
- 2) The proposed method of providing community housing (on-site, off-site, conveyance of land and/or payment of an in lieu fee) and the appropriate justification.
- 3) If community housing units are to be constructed, the Plan shall include:
 - (a) A conceptual site plan and building floor plan illustrating the number of community housing units proposed their location in relation to the other development on the site and surrounding land uses, and the number and size of bedrooms and square footage of each unit.
 - (b) A tabular summary of the number of community housing units, the number and size of bedrooms of each unit, the rental/sale mix, and the sales price or rent for each unit.
 - (c) The proposed restrictions to be placed on the community housing units to ensure they remain affordable and comply with the Community Housing Guidelines, as amended.
- 4) If payment of an in lieu fee is proposed, the Plan shall include the amount of the fee to be paid and the supporting calculations.
- 5) If land is to be conveyed, the Plan shall include:
 - (a) A survey depicting the location, size and topography of the land proposed for conveyance.
 - (b) A title report demonstrating clear title, physical and legal access, liens, easements, and other information necessary to fully describe the legal status of the property.
 - (c) Verification that conditions of the land, any restrictions on title to the land (such as covenants and easements) and the applicable Land Use Codes allow the development of residential units on the land, and that the site generally can be developed for community housing.

- (d) An appraisal of the fair market value of the land.
 - (e) Any additional information or studies determined by the Community Development Director to be necessary to verify the suitability of the land for development.
- 6) **Community Housing Agreement**
 The agreement by a developer to implement the Plan shall be established in a Community Housing Agreement. The Agreement shall be in a form approved by the City Attorney and shall include the following:
- (a) If the Plan proposes the construction of community housing units, the Agreement shall identify: the location, number, type and size of community housing units to be constructed; sales and/or rental terms; occupancy requirements; a timetable for completion of the units; construction specifications; and the restrictions to be placed on the units to ensure their permanent affordability and compliance with the Community Housing Guidelines, as amended.
 - (b) If the Plan proposes the conveyance of land, the Agreement shall identify the land to be conveyed, its fair market value, and the time at which the land will be conveyed to the City.
 - (c) If the Plan proposes the payment of an in lieu fee, the Agreement shall identify the amount of the fee to be paid, and the time of payment.
 - (d) If the Plan proposes a combination of methods (construction of units, conveyance of land, or in lieu fee), the Agreement shall identify the appropriate provisions for each method of mitigation.

b. **Review of the Inclusionary Housing Plan**

- 1) The procedures for review of the Inclusionary Housing Plan shall be the same as for the subdivision application with which it is submitted.
- 2) The Plan shall be approved, approved with conditions, or disapproved by the Planning & Zoning Commission and the City Council, based on the standards of this Section. A decision on the Plan shall be made prior to a decision on

the residential subdivision with which it is submitted. A subdivision plat shall not be approved without an Inclusionary Housing Plan approved pursuant to the procedures and standards of this Section.

- 3) An approved Inclusionary Housing Plan may be amended or modified only in accordance with the procedures and standards established for its original approval.

10. Community Housing Guidelines

The construction and occupancy of all community housing units shall comply with the Community Housing Guidelines, as amended from time to time by the City Council. If any conflict should arise between the Community Housing Guidelines and this Ordinance, the provisions contained in this Ordinance shall control.

- a. All community housing units constructed pursuant to this Section shall comply with the sales and/or rental terms, appreciation rates, housing type, and occupancy requirements of the Community Housing Guidelines, as amended.
- b. All community housing units shall comply with the size, materials and design requirements and construction standards of the Community Housing Guidelines, as amended.
- c. All community housing units shall comply with all other requirements of the Community Housing Guidelines, as amended, to ensure they are maintained, occupied and owned/rented as community housing units.

11. Community Housing Trust Account

- a. For the purpose of ensuring that any fees collected pursuant to this section are spent for community housing and consequently benefit the fee payers, an interest-bearing Community Housing Trust Account shall be established.
- b. All fees collected pursuant to this section shall be immediately deposited into the Community Housing Trust Account.
- c. All proceeds in the Community Housing Trust Account not immediately necessary for expenditure shall be invested in an interest-bearing account. All income derived from these investments shall be retained in the trust account until spent or refunded.

- d. All funds deposited into the Community Housing Trust Account and accrued interest shall be expended only for the purposes of planning, subsidizing or developing community housing units in McCall.

12. Refund of In Lieu Fee

- a. A fee collected pursuant to this section and three (3) percent interest compounded annually, shall be returned upon written request, to the developer of the subdivision for which a fee was paid if the fee has not been obligated within five (5) years from the date the fee was paid. Notwithstanding, if the City Council has earmarked the funds for expenditure on a specific community housing project, the Council may extend the time period by up to five (5) additional years.
- b. To obtain the refund, the developer must submit a written request to the Community Development Director within one (1) year from the end of the fifth (5th) year from the date payment was received, or within one (1) year from the end of the time this refund requirement is extended by the City Council. Said request shall be accompanied by proof of ownership of the property at the time the refund is requested or contract or option to purchase at the time the refund is requested, and a copy of the receipt verifying payment of the fee.
- c. For the purpose of this Section, fee payments shall be deemed spent in the order in which they are paid. The first (1st) payment made shall be the first (1st) payment spent.

13. Adjustments

- a. The requirements of this section 9.7.10 may be adjusted or waived by the City Council if the developer demonstrates and the Council finds that there is no reasonable relationship between the housing impact of the proposed residential subdivision and the requirements of this section.
- b. The developer shall have the burden of providing economic information or other data and evidence necessary to establish that the housing impact of the proposed residential subdivision has no reasonable relationship to the requirements of this chapter.
- c. The developer must make said demonstration concurrently with the first submittal of an application for the residential subdivision.

- d. The City Council shall make the determination to adjust or maintain the requirements of this section concurrently with the initial decision to approve or deny the proposed residential subdivision.

SECTION 2 Severability.

In the event that any court of competent jurisdiction enters its judgment or order declaring any portion of Section 9.7.10 to be invalid, then such judgment shall only affect that portion of the ordinance so adjudicated, and all other remaining portions shall remain in full force and effect.

EFFECTIVE DATE

Regularly passed, approved and adopted by the Mayor and City Council of the City of McCall, Idaho, this 2nd day of February, 2006.

(seal)



Walt
Mayor

ATTEST:

Joanne E. York
City Clerk

**A SUMMARY OF ORDINANCE NO. 819
PASSED BY THE CITY OF McCALL, IDAHO**

AN ORDINANCE OF THE CITY OF McCALL, IDAHO AMENDING THE CITY OF McCALL SUBDIVISION AND DEVELOPMENT CODE, TITLE 9 TO REQUIRE ALL NEW SUBDIVISIONS TO INCLUDE A CERTAIN NUMBER OF COMMUNITY HOUSING UNITS TO BE AFFORDABLE TO THE CITY'S WORKFORCE.

The principal provisions of Title 9 by adding Section 9.7.10, Inclusionary Housing, requires as follows:

- Provides for Inclusionary Housing, which provides for at least twenty percent of the housing to be affordable community housing and provides options for providing the community housing.
- Provides for Community Housing by Income Category, which requires that a minimum of twelve (12) percent of the community housing lots and/or housing units to be affordable.
- Provides for a Community Housing On Site section.
- Provides for a Community Housing Off Site section.
- Provides for a Land Conveyance section.
- Provides for a Fee In Lieu section, which provides that a fee shall be calculated and collected according to certain standards.
- Provides for a Deed Restriction section and includes a provision for a nine (9) month period if within this time period there are no qualified buyers of the unit that the City Council may remove the community housing deed restrictions.
- Provides for a Timing of Occupancy section.
- Provides for an Inclusionary Housing Plan that provides for calculation of the number of housing units required and review of the inclusionary housing plan.
- Provides for a Community Housing Guidelines section.
- Provides for a Community Housing Trust Account section to ensure the fees collected benefit the fee payers; that the fees are deposited into the trust account, and to allow for an interest-bearing account and for accrued interest.
- Provides for a Refund of In Lieu Fee section.
- Provides for an Adjustments section.

The Ordinance shall be effective upon publication of this Summary.

The full text of the Ordinance is available for review at City Hall and will be provided by the City Clerk to any citizen upon personal request. The full text is also available online at www.mccall.id.us.

APPROVED BY THE COUNCIL OF THE CITY OF McCALL, IDAHO, THIS 9th DAY
OF March, 2006.



Approved:

By: W. W. W.
Mayor

Attest:

By: Joanne E. York
City Clerk

msg\W:\Work\M\McCall, City of 21684\2006 Ordinances\Sum Ord Inclusionary Housing Title 9 Subdiv & Dev\pant Code 03 01 06.doc

**EXHIBIT “B”
ALPINE VILLAGE
DEVELOPMENT AGREEMENT**

EXHIBIT "B"

Recording Requested By and
When Recorded Return to:

City Clerk
City of McCall
216 East Park Street
McCall, Idaho 83638

Instrument # 328801

VALLEY COUNTY, CASCADE, IDAHO

2008-01-28

04:27:07 No. of Pages: 9

Recorded for : CITY OF MCCALL

ARCHIE N. BANBURY

Ex-Officio Recorder Deputy

Index to: MISCELLANEOUS RECORD

Fee: 0.00

For Recording Purposes Do
Not Write Above This Line

DEVELOPMENT AGREEMENT ALPINE VILLAGE PLANNED UNIT DEVELOPMENT

This Development Agreement is entered into by and between the City of McCall, a municipal corporation of the State of Idaho, hereinafter referred to as the "City", and Alpine Village Company, hereinafter referred to as "Alpine Village", whose address is 1101 W. River Street, Suite 300, Boise Idaho, 83702, and who is the owner of the Alpine Village Planned Unit Development ("the PUD"), which is more particularly described in the attached Exhibit "A".

WHEREAS, the Preliminary and General Development Plans for the PUD have been granted by the City, as PUD No. 06-3 and the Preliminary Plat for the PUD has been approved by the McCall Planning and Zoning Commission, as Subdivision 06-7.

WHEREAS, the said approvals contained various conditions regarding which the City and Alpine Village have reached agreement and which agreement the City and Alpine Village desire to memorialize,

WHEREAS, Alpine Village has submitted its Application for Approval of the Final Plat for Phase 1 of the PUD, and anticipates submitting final plats for the balance of the PUD in phases ("the Phases").

WHEREFORE, the City of McCall and the Alpine Village do enter into this Agreement for and in consideration of the mutual covenants, duties and obligations herein set forth, do agree as follows:

ARTICLE I LEGAL AUTHORITY

- 1.1 This Development Agreement is made pursuant to and in accordance with the provisions of Section 9.6.06 of the McCall City Code.

**ARTICLE II
SANITARY SEWER SYSTEM IMPROVEMENTS**

- 2.1 Alpine Village shall relocate the existing sewer through the PUD as part of its construction of Phase 1 of the PUD and shall complete such work in accordance with the approved plans therefor as a condition of final approval of its Phase 2 Final Plat. Alpine Village shall be responsible for establishing to the satisfaction of the City that the existing sewer line has adequate capacity for the PUD and its proposed uses, together with the current upstream flow. Otherwise, Alpine Village shall replace the line as necessary to assure such capacity. The City shall be responsible for the pro rata cost of materials and labor for any additional capacity upgrade which is requested by the City.
- 2.2 The City shall be solely responsible for any replacement of the Washington Street sewer line, or any portion thereof, which is deemed necessary by the City, as well as all associated services and stub-outs.

**ARTICLE III
WATER SYSTEM IMPROVEMENTS**

- 3.1 Alpine Village shall complete all of the following described work in accordance with the approved plans therefor as part of its construction of Phase 1 of the PUD and shall complete such work as a condition of final approval of its Phase 2 Final Plat:
- 3.1.1 Installation of a new 8-inch water line on Washington Street, from 3rd Street to 1st Street. Alpine Village shall be responsible for 100% of the cost of this work, as well as the re-connection of all existing services to the new line.
- 3.1.2 Relocation of two (2) fire hydrants on the PUD Property to locations which are reasonably acceptable to the City. Alpine Village shall be responsible for 100% of the cost of such relocation.
- 3.1.3 Unless determined unnecessary by the City, replacement of an existing 6 inch line in 1st Street, *approximately between Washington Street and Railroad Avenue* with an 8 inch line. The City shall reimburse Alpine Village for 100% of the cost of this work.

ARTICLE IV ROADS

- 4.1 Alpine Village shall pave all of Railroad Ave from 1st Street to 3rd Street, at a minimum width of twenty (20) feet, in accordance with City specifications, by no later than the later to occur of the following: (a) twelve (12) months after the City secures the required right-of-way; or, (b) the final approval of the Final Plat for the Phase of the PUD which includes Building No. 3, as shown on the Application for PUD General Plan approval. In the event that the City is unable to secure the required right-of-way, then Alpine Village shall pave the portion of Railroad Avenue between 1st and 3rd Street for which adequate right-of-way exists. Alpine Village shall be responsible for 100% of the cost of this work.
- 4.2 As a condition of the final approval of its Final Plat for Phase 1 of the PUD, in lieu of providing sidewalk, curb and gutter along Railroad Avenue, Alpine Village shall construct sidewalk, curb and gutter along the Washington Street and 3rd Street frontages of the Bryan's Burger Den Property.
- 4.3 As a condition of the final approval of the Final Plat for Phase 1 of the PUD, Alpine Village shall prepare and submit a complete application to the Idaho Transportation Department ("ITD") for construction of a center turn lane along the 3rd Street/Highway 55 frontage of the PUD; and, upon the issuance of such Permit by ITD, Alpine Village shall construct such center turn lane. Such construction shall be completed in accordance with the approved plans therefor by no later than the later to occur of the following: (a) twelve (12) months after ITD issues its final Permit for the project; or, (b) the final approval of the Final Plat for Phase 2 of the PUD. Alpine Village shall be responsible for 100% of the cost of this work.
- 4.4 Alpine Village shall repave the full width of Washington Street wherever adjustments to the profile or the cross section of the Street are required for the PUD and shall reconnect Washington Street to existing driveways and entrances which are disturbed by such adjustments according to approved construction plans. Alpine Village shall be responsible for 100% of the cost of this work.

ARTICLE V STORM WATER

- 5.1 Alpine Village shall relocate the existing 24 inch storm water line which passes through the PUD as part of its construction of Phase 1 of the PUD and shall complete such work in accordance with the approved plans therefor as a condition of final approval of its Phase 2 Final Plat. Alpine Village shall be responsible for 100% of the cost associated with the relocation.
- 5.2 The City has determined that an increase in the size of the line from 24 to 30 inches is required to accommodate existing and projected flows. The City shall pay for the increased cost of materials for such upsizing.

- 5.3 Alpine Village and the City shall continue in good faith to evaluate the feasibility of a regional storm water BMP and the possible use by Alpine Village of and participation by Alpine Village in the cost of creating such a BMP.

ARTICLE VI PARKS AND SNOW REMOVAL

- 6.1 As part of its final platting of Phase 1 of the PUD, Alpine Village shall dedicate all of the area within the PUD which as platted as "Plaza Open Space" in a manner which assures that such area is open to the public during reasonable commercial hours and subject to scheduled special events. Material modifications to such dedication shall require the prior approval of the City.
- 6.2 Alpine Village shall provide one public restroom facility (ie. for men and women) which shall be open to the public during reasonable commercial hours.
- 6.3 The Alpine Village Property Owners Association shall be solely responsible for the maintenance and upkeep of the Plaza and the restrooms.
- 6.4 Alpine Village shall construct a connection between the Plaza Open Space and the pedestrian bike path located north of Railroad Avenue. This work shall occur prior to the submittal of Phase 3 final plat or prior to January 1, 2012, the earlier to occur.
- 6.5 The Alpine Village Property Owners Association shall be solely responsible for the snow removal and storage. Pending platting of the final Phase of the PUD, snow shall be stored on-site, in the area designated as "Future Development" on the Final Plat for Phase 1 of the PUD. A permanent off-site snow storage area shall be properly established prior to the final approval of the Final Plat for whichever of the PUD Phases is the last to be platted.

ARTICLE VII COMMUNITY HOUSING PLAN

- 7.1 Alpine Village's approved Community Housing Plan is attached hereto as Exhibit "B". Alpine Village waives and releases the City from any claims whatsoever regarding or stemming from the pending litigation between the Mountain Central Board of Realtors and the City (ie. Mountain Central Board of Realtors, et al v. City of McCall, et al, Valley County Case Number CV-2006-490-C) as to Community Housing Units which are sold pursuant to this Plan prior to the final disposition of such litigation. The Plan will be reviewed and modified, as necessary, to comply with the final disposition of the litigation as to any Community Housing Units which have not been sold prior to the final disposition of the litigation.

**ARTICLE VIII
CITY COST CONTRIBUTION**

- 8.1 On any of the aforesaid items of work performed by Alpine Village for which, under the terms of this Agreement, the City has agreed to reimburse Alpine Village for part or all of the cost of such work, the City shall reimburse Alpine Village as follows:
- 8.1.1 Upon completion of such work in accordance with the approved plans therefor, Alpine Village shall deliver a Notice of Completion together with an Invoice for the actual cost to Alpine Village of such work to the City;
 - 8.1.2 The City shall notify Alpine Village within ten (10) days after receiving such notice and Invoice of any claimed deficiencies or non-conformities of such work with the approved plans, and/or of any entries on the Invoice which the City considers inappropriate under the terms of this Agreement;
 - 8.1.3 Absent such notification, the work and the Invoice shall be deemed accepted by the City;
 - 8.1.4 In the event of such notification regarding work deficiencies or non-conformities or Invoice improprieties, the parties shall attempt in good faith to resolve any disputed issues. If the parties are unable to do so, then any such remaining disputes shall be resolved by binding arbitration according to the rules of the American Arbitration Association.
 - 8.1.5 The City shall remit the full amount of such Invoice, unless adjusted by mutual agreement or arbitration, to Alpine Village no later than forty-five (45) days after the later to occur of the following: (i) the City's receipt of the Invoice; (ii) in the event that corrective measures are undertaken by Alpine Village, as provided herein, the completion of such corrective measures; or, (iii) in the event of a dispute between the City and Alpine Village regarding the work or the Invoice, the final resolution of the dispute.

**ARTICLE IX
POWER, TELEPHONE AND CABLE TELEVISION**

- 9.1 Power, telecommunications and cable is currently available to the PUD.

**ARTICLE X
ALPINE VILLAGE'S FINANCIAL ASSURANCES**

- 10.1 Alpine Village shall guarantee 125% of the estimated cost to complete all of the public improvements for the PUD described in this Development Agreement, in accordance with the provisions of MCC 9.6.067(B) as follows:
- 10.1.1 The estimated cost to complete the Water System Improvements for Phase 1 of the PUD is \$89,985.00. 125% of that sum (ie. \$112,481.25) will be

guaranteed by Alpine Village prior to Phase 1 Final Plat recordation by means of either a Letter of Credit.

- 10.1.2 The estimated cost to complete the improvements to 3rd Street / State Highway 55 is \$90,391.50. 125% of that sum (ie. \$112,989.38) will be guaranteed by Alpine Village prior to Phase 1 Final Plat recordation by means of a Letter of Credit.
- 10.1.3 The estimated cost to complete the aforesaid storm water improvements is \$122,947.00. 125% of that sum (ie. \$153,683.75) will be guaranteed by Alpine Village prior to Phase 1 Final Plat recordation by means of a Letter of Credit.
- 10.1.5 Completion of the public improvements for subsequent phases of the PUD will be guaranteed by Alpine Village prior to Final Plat recordation for those Phases, in the manner provided above.

ARTICLE XI MISCELLANEOUS

- 11.1 This Agreement may be modified only by means of a subsequently executed and acknowledged written agreement.
- 11.2 In the event Alpine Village fails to comply with the commitments set forth herein, within one hundred twenty (120) days of written notice of such failure from the City, in addition to any other remedies which the City may have available to it, the City shall have the right, without prejudice to any other rights or remedies, to cure such default or enjoin such violation and otherwise enforce the requirements contained in this Development Agreement, and to collect the direct costs associated with such action from Alpine Village.
- 11.3 In the event that a judicial dispute arises regarding the enforcement or breach of this Agreement, or arbitration ensues pursuant to Article VIII above, then the prevailing party in such dispute shall be entitled to recover its attorneys' fees and costs reasonably incurred, including fees and costs incurred in on appeal.
- 11.4 If any term, provision, commitment or restriction of this Development Agreement or the application thereof to any party or circumstances shall, to any extent be held invalid or unenforceable, the remainder of this Agreement shall remain in full force and effect.
- 11.5 After its execution, this Development Agreement shall be recorded in the office of the Valley County Recorder, at the expense of Alpine Village. Each commitment and covenant contained in this Agreement shall constitute a burden on, shall be appurtenant to, and shall run with the PUD Property. This Development Agreement shall be binding on the City and Alpine Village and their respective heirs, administrators, executors, agents, legal representatives, successors and

assigns; provided, however, that if all or any portion of the PUD Property is divided, each owner of a legal lot shall only be responsible for duties and obligations associated with an owner's parcel and shall not be responsible for duties and obligations or defaults as to other parcels of lots within the Property. Alpine Village shall not be relieved of its responsibilities and duties under this Agreement absent an agreement with the City which designates a successor to Alpine Village, who accepts such responsibilities and duties as are then remaining.

- 10.6 Any notice which a party may desire to give to another party must be in writing and may be given by personal delivery, by mailing the same by registered or certified mail, return receipt requested postage prepaid, or by Federal Express or other reputable overnight delivery service, to the party to whom the notice is directed at the address of such party set forth below:

McCall: City Clerk
City of McCall
216 East Park
McCall, Idaho 83638

Alpine Village: Alpine Village Company
1101 West River Street, Suite 300
Boise, Idaho 83702
Attn: Mike Hormaechea

With copy to:
Steve Millemann
Millemann, Pittenger, McMahan & Pemberton LLP
P.O. Box 1066
McCall, Idaho 83638

or such other address and to such other persons as the parties may hereafter designate in writing to the other parties. Any such notice shall be deemed given upon delivery if by personal delivery, or three (3) business days after deposit in the United States mail, if sent by mail..

EXHIBIT "A"

SECESH ENGINEERING, INC.

335 Delnhard Lane, Suite 1
P.O. Box 70
McCall, ID 83638
208-834-6338 • FAX 208-834-6322

DATE: May 25, 2007
PROJECT: 0415
PAGE: 1 OF 2

LEGAL DESCRIPTION
ALPINE VILLAGE CONDOMINIUMS PHASE 1

A parcel of land, a part of blocks 2, 5 and 6, vacated Lakeport Addition, located in the SW 1/4 of Section 9, T.18N., R.3 E., B.M., City of McCall, Valley County, Idaho, more particularly described as;

COMMENCING at the south 1/4 corner of said Section 9,

- A.) N.38°38'32"W., 869.03 feet to a point on the west Right-of-Way line for Third Street, and the SE corner block 6 Vacated Lakeport Addition; thence, along said Right-of-way,
- B.) N.0°03'08"E., 102.01 feet to the POINT OF BEGINNING; thence, departing said Right-of-Way,
 - 1.) N.90°00'00"W., 36.28 feet; thence,
 - 2.) N.0°00'00"E., 37.97 feet; thence,
 - 3.) N.45°00'00"W., 129.94 feet; thence,
 - 4.) N.90°00'00"W., 59.94 feet; thence,
 - 5.) S.45°00'00"W., 81.66 feet; thence,
 - 6.) N.90°00'00"W., 94.78 feet; thence
 - 7.) N.0°00'00"E., 62.52 feet; thence,
 - 8.) N.44°59'55"E., 151.44 feet; to a point on a curve, thence,

- 9.) Northeasterly along said curve to the left having a radius of 2934.93 feet, an arc length of 234.08 feet, through a central angle of $4^{\circ}34'11''$, and a chord bearing and distance of $N.42^{\circ}55'53''E.$, 234.02 feet; thence
- 10.) $S.0^{\circ}46'47''W.$, 45.05 feet; thence,
- 11.) $S.89^{\circ}54'10''E.$, 127.93 feet; thence,
- 12.) $S.1^{\circ}07'41''W.$, 63.00 feet; thence,
- 13.) $N.89^{\circ}44'40''E.$, 162.52 feet; thence,
- 14.) $S.0^{\circ}03'08''E.$, 305.54 feet; to the POINT OF BEGINNING.

CONTAINING 2.28 Acres, more or less.

SUBJECT TO all Covenants, Rights-of-Way and Easements of Record.

EXHIBIT "B"
TO ALPINE VILLAGE DEVELOPMENT AGREEMENT
COMMUNITY HOUSING PLAN
FOR ALPINE VILLAGE PLANNED UNIT DEVELOPMENT
(May 22, 2007)

PUD Final Plan – 100 market rate units (3 more than PUD Preliminary Plan – incorporating Burger Den property)

Community Housing Requirements: 20 units

Proposed C.H. Units on-site: 6

Proposed C.H. Units off-site: 17, calculated as follows:

Remaining required C.H. units: 14

Off-site "penalty": 125%

Total C.H. off-site requirement: 17.50 (fractional unit to be covered by in lieu fee)

Implementation Relative to Project Phasing:

Phase 1 (consisting of 25 market rate units): 2 C.H. units on-site + 6 Timbers
Condominiums (2.25 units more than
phase requirement – 32% of units)

Phase 2 (consisting of 15 market rate units): 2 C.H. units on-site + 5 Timbers
Condominiums (3.75 units more than
phase requirement – 47% of units)

Phase 3 (consisting of 25 market rate units): 2 C.H. units on-site + 6 Timbers
Condominiums (2.25 units more than
Phase requirement – 32% of units)

Phase 4 (consisting of 35 market rate units): .50 unit in lieu fee

IN WITNESS WHEREOF, the parties have hereunto caused this Agreement to be executed, effective on the day and year first above written.

ALPINE VILLAGE COMPANY

CITY OF MCCALL

By: *Michael B. Hormaechea*
Michael B. Hormaechea, President

By: *William A. Robertson*
William A. Robertson, Mayor

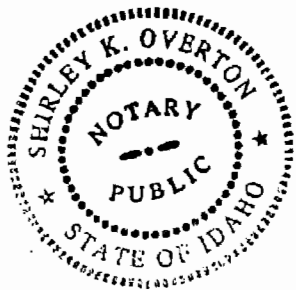
ATTEST:

By: *Lucy Quail*
Lucy Quail, City Clerk

STATE OF IDAHO,)
(ss
County of Valley.)

On this 13 day of Dec, 2007, before me, Shirley K Overton, a Notary Public in and for said State, personally appeared **Michael B. Hormaechea**, President of **ALPINE VILLAGE COMPANY**, known or identified to me to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same for and on behalf of said Limited Liability Company.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.



Shirley K Overton
NOTARY PUBLIC FOR IDAHO
My Commission Expires: 11-21-08

STATE OF IDAHO,)
(ss.
County of Valley.)

On this 13 day of Dec, 2007, before me, Shirley K. Overton, a Notary Public in and for said State, personally appeared William A. Robertson known or identified to me to be the Mayor of the City of McCall, who executed the said instrument, and acknowledged to me that said municipality executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.



Shirley K. Overton
NOTARY PUBLIC FOR IDAHO
My Commission Expires: 11-21-08

STATE OF IDAHO,)
(ss.
County of Valley.)

On this 13 day of Dec, 2007, before me, Shirley K. Overton, a Notary Public in and for said State, personally appeared Fred Buiel known or identified to me to be the City Clerk of the City of McCall, who executed the said instrument, and acknowledged to me that said municipality executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.



Shirley K. Overton
NOTARY PUBLIC FOR IDAHO
My Commission Expires: 11-21-08

EXHIBIT “C”
MEMORANDUM DECISION AND
ORDER IN MOUNTAIN
CENTRAL BOARD OF
REALTORS, INC. V. CITY OF
MCCALL

EXHIBIT "C"

ARCHIE N. BANBURY, CLERK
BY [Signature] DEPUTY

FEB 19 2008

Case No. _____ Inst. No. _____
Filed _____ AM 5:00 PM

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

MOUNTAIN CENTRAL BOARD OF
REALTORS, INC., an Idaho Non-Profit
Corporation,

Plaintiff,

vs.

CITY OF MCCALL, a municipal corporation of
the State of Idaho,

Defendant.

Case No. CV 2006-490-C

MEMORANDUM DECISION
AND ORDER GRANTING
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT

APPEARANCES:

David Gratton and Victor Villegas, for the Plaintiff

William A. Morrow, Christopher D. Gabbert, and Jill S. Holinka, for the Defendant

This matter came before the Court for oral argument on July 13, 2007, regarding Plaintiff's Motion for Summary Judgment. On July 14, 2007, Plaintiff filed a Notice of Supplemental Authority.

FACTUAL AND PROCEDURAL BACKGROUND

The facts and procedural history of this case were set forth in more detail in the Court's previously filed Memorandum Decision and Order Denying the Defendant City of McCall's Motion for Summary Judgment on the issue of standing. Essentially, Plaintiff is challenging the constitutionality of two ordinances passed in February of 2006 by the City of McCall: Ordinance No. 819 which is an inclusionary zoning ordinance, and Ordinance No. 820 which is the residential linkage or community

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1 housing fee ordinance.¹ Such ordinances were enacted to ensure and provide for affordable housing in
2 the City of McCall.

3 Under Ordinance No. 819, all applications for new subdivisions are required to submit an
4 inclusionary housing plan providing that twenty percent (20%) of lots and houses be permanently deed-
5 restricted as affordable community housing as a precondition to plat approval. Specifically, Ordinance
6 No. 819 is designed to provide for "community housing to be affordable to City of McCall households
7 with incomes in categories III and IV as defined in subsection 2, Community Housing by Income." City
8 of McCall Ordinance No. 819, § 9.7.10(A). These categories define moderate to middle income.
9 Category III includes households with incomes greater than one hundred percent (100%) but not more
10 than one hundred twenty percent (120%) of the Valley County median household income. Category IV
11 includes households with incomes greater than one hundred twenty percent (120%) but not more than
12 one hundred sixty percent (160%) of the Valley County median household income.
13

14 There are four ways by which an applicant for subdivision approval may meet the requirements
15 of Ordinance No. 819: (1) the first priority is to permanently deed restrict twenty percent (20%) of the
16 land within the subdivision for affordable housing, called "on-site" housing; (2) the second priority is to
17 construct such housing "off-site" from the proposed subdivision;² (3) the third priority is to convey land;
18 and (4) the fourth priority is to pay a fee in lieu of the previous three options.
19
20

21 ¹ Although Ordinance No. 819 is referred to as the inclusionary zoning ordinance and
22 Ordinance No. 820 is the linkage ordinance, the Court generally refers in this
decision to both ordinances as inclusionary zoning ordinances.

23 ² If community housing is constructed off-site, the required percentage of land
24 allocated to affordable housing increases from twenty percent (20%) of the
subdivision land to one hundred twenty-five percent (125%) if the housing is built
25 within the city of McCall; or to one hundred fifty percent (150%) if the housing is built
within the city limits of another municipality located in Valley or Adams
Counties; or to two hundred percent (200%) if the housing is built within
unincorporated Valley or Adams Counties.

Under Ordinance No. 820, all applicants for a building permit are required to pay a community housing fee for each residential dwelling unit that is proportional to the demand for community housing created by the dwelling unit. Ordinance No. 820 is designed to benefit employees of low or moderate income in categories I and II who are needed to maintain and service the residential dwelling unit.¹ Low income is defined in Category I as households with incomes greater than fifty percent (50%) but not more than eighty percent (80%) of the Valley County median household income. Income Category II includes households with incomes greater than eighty percent (80%) but not more than one hundred percent (100%) of the Valley County median household income. Certain residential development is exempted under Ordinance No. 820 such as redevelopment, remodeling or relocation of any legally pre-existing residential unit, expansion up to 500 square feet, mobile homes, skilled nursing facilities, retirement or assisted living homes, foster homes, and community housing units. City of McCall Ordinance No. 820, § 3.8.21(C).

Plaintiff filed a Verified Complaint on September 22, 2006, seeking declaratory relief that the City of McCall's Ordinance Numbers 819 and 820 violate both State and Federal laws and constitutions, and seeking a permanent injunction enjoining the City from enforcing such ordinances against its members. Defendant filed an Answer on October 18, 2006, asserting a number of affirmative defenses including no justiciable case or controversy, ripeness, standing, failure to join an indispensable party.

¹ Ordinance No. 820 defines the community housing fee as follows:

The community housing fee shall be commensurate with the current community housing subsidy amount required to develop and construct community housing for fifty (50) percent of the employees needed to maintain and service the dwelling unit and who have incomes in Income Categories I and II. The number of employees needed to maintain and service the residential unit varies based on the size of the unit.

City of McCall Ordinance No. 820, § 3.8.21(D)(1)(a).

1 and no irreparable injury.

2 Plaintiff filed a Motion for Summary Judgment along with a Motion to File Brief Exceeding
3 Twenty-Five (25) Pages on November 20, 2006. This Court entered an Order Granting Plaintiff's
4 Motion to File Brief Exceeding Twenty-Five (25) Pages on November 29, 2006. On December 6, 2006,
5 the parties filed a Stipulated Litigation Schedule. Defendant filed a Stipulation to Exceed Page Limit on
6 February 7, 2007, allowing Defendant to file a Response Brief in excess of the twenty-five page limit.

7 On May 22, 2007, this Court issued a Memorandum Decision and Order Denying the Defendant
8 City of McCall's Motion for Summary Judgment, holding that the Plaintiff did have "associational"
9 standing to pursue its claim. On May 31, 2007, the parties filed a Stipulation to Amend Litigation
10 Schedule. Also on that date, Plaintiff filed an Amended Notice of Hearing.
11

12 STANDARD OF REVIEW

13 Idaho Rule of Civil Procedure 56 provides that summary judgment is proper when the court is
14 satisfied that "there is no genuine issue as to any material fact and that the moving party is entitled to
15 judgment as a matter of law." I.R.C.P. 56(c). All disputed facts are to be resolved and all reasonable
16 inferences drawn in favor of the non-moving party. See *Stafford v. Klosterman*, 134 Idaho 205, 206, 998
17 P.2d 1118, 1119 (2000); *Smith v. Meridian Joint Sch. Dist. No. 2*, 128 Idaho 714, 719, 918 P.2d 583,
18 588 (1996). If reasonable persons could reach different findings or draw conflicting inferences from the
19 evidence, the motion must be denied. *Jordan v. Beeks*, 135 Idaho 586, 590, 21 P.3d 908, 912 (2001);
20 *Smith*, 128 Idaho at 718, 918 P.2d at 587.
21

22 The district court as the trier of fact may draw reasonable inferences based upon the evidence
23 before it and may grant summary judgment despite the possibility of conflicting inferences. *Karstman v.*
24 *Jameson*, 132 Idaho 910, 913, 980 P.2d 574, 577 (Ct. App. 1999) (citing *Cameron v. Neal*, 130 Idaho
25 898, 900, 950 P.2d 1237, 1239 (1997)). See also Idaho Code Ann. § 10-1201 (2005). Where the matter
26

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1 would be tried without a jury, the court is "free to arrive at the most probable inferences to be drawn
2 from uncontroverted evidentiary facts." *Loomis v. City of Halley*, 119 Idaho 434, 437, 807 P.2d 1272,
3 1275 (1991); accord *Steiner v. Ziegler-Tamura Ltd.*, 138 Idaho 238, 241, 61 P.3d 595, 598 (2002). If
4 the evidentiary facts are not in dispute, the trial court may grant summary judgment despite the
5 possibility of conflicting inferences, because the court alone will be in the position of resolving the
6 conflicting inferences at trial. *Riverside Development Co. v. Ritchie*, 103 Idaho 515, 519, 650 P.2d 657,
7 661 (1982).

8 In order to challenge the constitutionality of a statute or ordinance, the plaintiff has the burden of
9 showing the invalidity of such statute or regulation and must overcome the strong presumption of
10 validity. *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 709, 791 P.2d 1285, 1288 (1990); see also *Wyckoff*
11 *v. Board of County Commissioners*, 101 Idaho 12, 14, 607 P.2d 1066, 1068 (1980). "It is generally
12 presumed that legislative acts are constitutional, that the state legislature has acted within its
13 constitutional powers, and any doubt concerning interpretation of a statute is to be resolved in favor of
14 that which will render the statute constitutional." *Olsen*, 117 Idaho at 709, 791 P.2d at 1288. The party
15 asserting a facial challenge to an ordinance must demonstrate that the "law is unconstitutional in all of
16 its applications. . . . [And] that no set of circumstances exists under which the [law] would be valid."
17 *American Falls Reservoir Dist. No. 3 v. Idaho Dep't of Water Resources*, 143 Idaho 862, ___, 154 P.3d
18 433, 441 (2007) (internal quotes omitted).

21 DISCUSSION

22 Inclusionary zoning ordinances appear to be a recent trend in the efforts of local communities,
23 especially in seasonal economy-based communities, to address the needs of providing affordable housing
24 for the local workforce. Inclusionary zoning or inclusionary housing ordinances generally require a
25 residential developer to set aside a specific percentage of new housing units for low or moderate income

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households. *Home Builders Ass'n of Northern California v. City of Napa*, 108 Cal.Rptr.2d 60, 62 n.1 (Cal. Ct. App. 2001) (citing Laura M. Padilla, *Reflections on Inclusionary Housing and a Renewed Look at its Viability*, 23 Hofstra L. Rev. 539, 540 (1995)).⁴

While a number of jurisdictions have case law discussing the constitutionality of inclusionary zoning ordinances, there is no case precedent which has been established in Idaho. Furthermore, there is no legislative authority in Idaho providing for inclusionary zoning provisions. Although not controlling, this Court is aware that a Decision on Summary Judgment was filed July 3, 2007, in Blaine County regarding an as-applied challenge to the City of Sun Valley's Workforce Housing Linkage Ordinance No. 364, in *Schaefer v. City of Sun Valley, Idaho*, Case No. CV-06-882.

In the case before this Court, there are no genuine issues of material fact. The dispositive issue is the purely legal question of whether Ordinance Nos. 819 and 820 are proper police power regulations of the City of McCall. This Court defers to the City of McCall's determination of a lack of affordable housing and to their laudable intention to address the issue; the question for this Court, however, is whether the methods of remedying this housing shortfall pass legal muster.

In Idaho, "a municipal corporation may exercise only those powers granted to it by either the state constitution or the legislature . . ." *Caesar v. State*, 101 Idaho 158, 160, 610 P.2d 517, 519 (1980). Article 12, Section 2 of the Idaho State Constitution provides for any county, city, or town to make and enforce all such local police, sanitary, and other regulations which are not in conflict with its charter or with the general laws, Idaho Const. Art. 12 § 2. The Idaho Supreme Court has recognized that "[t]he

⁴ *Home Builders Association of Northern California* illustrates the trend toward inclusionary zoning ordinances, especially in California where there is extensive legislation providing for affordable housing incentives. See Cal. Gov't Code § 65580 et seq. This case relied upon by the City of McCall is of little assistance to courts in Idaho where there is not extensive legislative authority for inclusionary zoning ordinances.

power to restrict the uses of property is within the police power of the state, delegable to its municipal subdivisions, and is not per se repugnant to the Constitution of the United States." *White v. City of Twin Falls*, 81 Idaho 176, 182, 338 P.2d 778, 781-82 (1959). Therefore, the power to zone derives from the police power of the state, and local legislative entities are authorized to enact zoning ordinances restricting the use of property within the corporate limits of the legislative entity. *City of Lewiston v. Knieriem*, 107 Idaho 80, 83, 685 P.2d 821, 824 (1984); see also *Dawson Enterprises, Inc. v. Blaine County*, 98 Idaho 506, 511, 567 P.2d 1257, 1262 (1977).

The Local Land Use Planning Act (LLUPA), at Idaho Code Section 67-6501 *et seq.*, was enacted in 1975. The Idaho Supreme Court has found that under LLUPA, "the legislature intended to give local governing boards broad powers in the area of planning and zoning." *White v. Bannock County Commissioners*, 139 Idaho 396, 400, 80 P.3d 332, 336 (2003) (citing *Worley Hwy. Dist. v. Kootenai County*, 104 Idaho 833, 663 P.2d 1135 (Ct. App. 1983)). Such zoning power is not unlimited, but must bear a reasonable relation to the goals of the state pursuant to the state's police powers. *Sprenger, Grubb & Assoc, Inc. v. City of Hailey*, 127 Idaho 576, 583, 903 P.2d 741, 748 (1995) (citing *City of Lewiston v. Knieriem*, 107 Idaho 80, 83, 685 P.2d 821, 824 (1984)); see also *Dawson Enterprises, Inc.*, 98 Idaho at 511, 567 P.2d at 1262.

The governmental power to interfere by zoning regulations with the general rights of the land owned by restricting the character of his use, is not unlimited, and other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare.

Dawson Enterprises, Inc., 98 Idaho at 511, 567 P.2d at 824 (citing *Cole-Collister Fire Protection Dist. v. City of Boise*, 93 Idaho 558, 468 P.2d 290 (1970) (quoting *Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1927))).

The Idaho Supreme Court has recognized that LLUPA is the exclusive and mandatory source for a municipality's planning and zoning authority. *Sprenger, Grubb & Assocs, Inc. v. City of Hailey*, 133 Idaho 320, 321, 986 P.2d 343, 344 (1999). Under the LLUPA, a governing board, consisting of either a city council or a properly delegated planning and zoning commission, is given the powers authorized under the LLUPA. Idaho Code Ann. § 67-6504. Under section 67-6508, the planning and zoning commission is to conduct a comprehensive planning process designed to prepare a comprehensive plan which outlines the desirable goals and objectives for each planning component including in pertinent part:

An analysis of provisions which may be necessary to insure that land use policies, restrictions, conditions and fees do not violate private property rights, adversely impact property values or create unnecessary technical limitations on the use of property and analysis as prescribed under the declarations of purpose in chapter 80, title 67, Idaho Code.⁵

Idaho Code Ann. § 67-6508(a).⁶ Furthermore, the comprehensive plan should include a provision relating to housing containing:

An analysis of housing conditions and needs; plans for improvement of housing standards; and plans for the provision of safe, sanitary, and adequate housing, including the provision for low-cost conventional housing, the siting of manufactured housing and mobile homes in subdivisions and parks and on individual lots which are sufficient to maintain a competitive market for each of those housing types and to address the needs of the community.

Idaho Code Ann. § 67-6508(1).⁷ The LLUPA expressly identifies the need to maintain a balance between protecting property rights and providing for affordable housing by stating that one of its

⁵ Title 67, chapter 80 of the Idaho Code is known as the Idaho Regulatory Takings Act, which establishes a review process to evaluate regulatory takings.

⁶ Subsection (a) on property rights was added in 1995. Local Land Use Planning-Property Rights-Planning and Zoning Commissions, ch. 181, sec.4, § 67-6508, 1995 Idaho Sess. Laws H.B. 212.

1 purposes is "[t]o protect property rights while making accommodations for other necessary types of
2 development such as low-cost housing and mobile home parks." Idaho Code Ann. § 67-6502(a).

3 With respect to zoning ordinances, the LLUPA provides that the governing board shall "establish
4 standards to regulate and restrict the height, number of stories, size, construction, reconstruction,
5 alteration, repair or use of buildings and structures; percentage of lot occupancy, size of courts, yards,
6 and open spaces; density of population; and the location and use of buildings and structures." Idaho
7 Code Ann. § 67-6511. Furthermore, the governing board may "require or permit as a condition of
8 rezoning that an owner or developer make a written commitment concerning the use or development of
9 the subject parcel." Idaho Code Ann. § 67-6511A.

10 The inclusionary zoning ordinances at issue in this case go well beyond the traditional zoning
11 standards relating to height, size, construction, zoning areas, open space requirements, density, and
12 location. The City of McCall argues it is regulating the use to which certain land or housing may be put
13 by requiring developers to deed restrict a percentage of new development as affordable or community
14 housing. There is no doubt that the City of McCall determined there exists a need for affordable housing
15 in McCall. Although LLUPA specifically allows a city to include within its comprehensive plan
16 regulations affecting property rights and housing conditions, LLUPA does not specifically address
17 whether the City of McCall or any other city may enact inclusionary zoning ordinances. Given the
18 relatively recent trend towards inclusionary zoning ordinances since LLUPA has been enacted in Idaho,
19 it is not surprising that LLUPA does not specifically address inclusionary zoning ordinances. Thus,
20
21
22
23

24 ⁷ Also in 1995, the Legislature inserted the language regarding low-cost housing.
25 Local Land Use Planning-Property Rights-Planning and Zoning Commissions, ch. 181,
26 sec. 4. § 67-6508, 1995 Idaho Sess. Laws H.B. 212.

1 whether the City of McCall may require affordable housing through a land use regulation is a matter of
2 first impression which this Court must decide.

3 **A. Restrictions on the City of McCall's Police Powers**

4 The Idaho Supreme Court has recognized three general restrictions on a municipality's police
5 powers: (1) the ordinance must be confined to the limits of the governmental body enacting the same;
6 (2) such ordinance must not be in conflict with other general laws of the state; and (3) such ordinance
7 must not be an unreasonable or arbitrary enactment. *Hobbs v. Abrams*, 104 Idaho 205, 207, 657 P.2d
8 1073, 1075 (1983) (citing *State v. Clark*, 88 Idaho 365, 374, 399 P.2d 955, 960 (1965)).

9
10 **I. Regulation Within the City Limits of McCall**

11 In *Hobbs*, the county passed an ordinance which prohibited the sale of beer in kegs in "Franklin
12 County," and also prohibited the possession of beer in kegs within the "unincorporated areas of Franklin
13 County." 104 Idaho at 207, 657 P.2d at 1075. The plaintiff in that case owned two businesses licensed
14 to sell beer in Franklin, Idaho and Preston, Idaho. The Idaho Supreme Court held that the plaintiff did
15 not have standing to challenge the ordinance since his businesses were within an incorporated city and
16 the county did not have the authority to regulate activities within incorporated cities. *Id.* at 208, 657
17 P.2d at 1076. Similarly, in the underlying case, the City of McCall's Ordinance Nos. 819 and 820 only
18 have power and effect within the limits of the City of McCall. Although the ordinances repeatedly state
19 that such ordinances have been implemented in partnership with Valley County, Adams County, and the
20 communities of Cascade, Donnelly, and New Meadows, Ordinance Nos. 819 and 820 can only regulate
21 land use permits in the City of McCall.¹ Therefore, Ordinance Nos. 819 and 820 would not apply to a
22 landowner who owns and wishes to subdivide land located outside the city limits of McCall.
23
24

25
26 ¹ Pursuant to Ordinance No. 819, if a developer provides community housing off-site, the developer is required to provide 125 percent of the amount of land which would

2. Not in Conflict with Other General Laws of the State

Under the second prong of *Hobbs*, this Court must determine whether Ordinance Nos. 819 and 820 are in conflict with other general laws of the state. The stated purpose of these ordinances is to provide a "reasonable supply of affordable, deed restricted workforce housing (community housing)" to "ensure that critical professional workers, essential service personnel, and service workers live within proximity to their work to provide municipal and private sector services." In order to obtain a building permit to subdivide land and build houses or dwelling units, a landowner must designate at least twenty percent of the land or lots as deed-restricted community housing under Ordinance No. 819. Furthermore, in order to build residential dwelling units, a landowner is required to pay a community housing fee for a building permit under Ordinance No. 820.

Pursuant to Ordinance No. 819, upon applying for subdivision approval, a developer must submit an Inclusionary Housing Plan which designates that at least twenty percent of all the lots and houses in the subdivision have been permanently deed-restricted⁶ as community housing and affordable to households in McCall with moderate or middle incomes in categories III and IV. Ordinance No. 819 specifically states that providing on-site community housing within the new subdivision is the first priority. However, if a landowner or developer is not able to designate community housing within the proposed subdivision, the second priority is for the developer to designate community housing outside

have been required on-site, if the off-site housing is "within the city limits of the City of McCall." Alternatively, if the off-site housing is located "within the city limits of another municipality located in Valley or Adams County," the developer is required to provide 150 percent of the amount which would have been required on-site. To the extent that the City of McCall attempts to regulate housing outside its city limit, such provision is without effect and therefore null and void.

⁶ Ordinance No. 819 also provides that as an alternative to permanent deed restriction, the developer may request that up to twenty-five percent of the lots and houses be subject to an "Equity-Builder" program.

1 the subdivision, or "off-site." The third priority is for a developer to convey land to the City of McCall
2 for community housing. And the fourth priority is to pay a fee in lieu of community housing.
3 Essentially, the McCall City Council decides pursuant to the priority list if on-site community housing is
4 impractical.

5 Under the first two priorities, a landowner still retains ownership of such community housing
6 units but is restricted regarding selling or renting community housing units.¹⁰ The third and fourth
7 priorities are reserved for situations in which it is not practical for the landowner to develop community
8 housing either on or off site because the required community housing units results in less than one
9 housing unit.¹¹ Under the third and fourth priorities, the landowner either conveys land calculated at fair
10 market value, or pays a fee equal to the total subsidy amount for the required community housing units.
11 Additionally, if the number of required community housing units result in a fraction under the first or
12 second priority, the landowner must pay an in lieu fee equal to the subsidy amount for that fraction.
13

14 For any community housing units provided under the first or second priorities, the developer
15 must enter into a Community Housing Agreement which sets forth, among a number of other
16 requirements, the sales or rental terms and the restrictions to ensure the permanent affordability and
17 compliance with the Community Housing Guidelines. The McCall Planning & Zoning Commission and
18 the City Council have the power to review and approve the Inclusionary Housing Plan. If the City
19 Council collects in lieu fees pursuant to the fourth priority, or fees for any fractional amount of
20 community housing, such funds are to be deposited into the Community Housing Trust Account to be
21

22
23 ¹⁰ Potential buyers or renters must meet the requirements established by the City of
24 McCall to qualify for affordable housing.

25 ¹¹ Because the developer is required to set aside twenty percent of the units as
26 community housing, the minimum number of units a developer must develop under the
first or second priorities would be five units, of which one unit must be community

spent for planning, subsidizing, or developing community housing units in McCall. A landowner may petition for a refund of the in lieu fees if such fees have not been expended by the City of McCall within five years, provided the City has not already earmarked the funds and extended the time period another five years.

Furthermore, the City of McCall may adjust or waive the requirements under Ordinance No. 819 if the developer demonstrates and the City Council finds there is "no reasonable relationship between the housing impact of the proposed residential subdivision and the requirements of this section." City of McCall Ordinance No. 819, § 9.7.10(A)(13)(a). The developer has the burden of providing economic information or data necessary to establish that there is no reasonable relationship.

Ordinance No. 820 requires that every landowner seeking a building permit for a residential dwelling unit, not exempted by the ordinance,¹² is required to pay a community housing fee. This fee represents the subsidy amount required to develop and construct community housing for fifty percent of the employees needed to maintain and service the dwelling unit and who have low to moderate incomes in categories I and II. Such fees are also deposited in the Community Housing Trust Account and similarly to Ordinance No. 819, a landowner may request a refund of such fees if they have not been

housing. Subdivisions with less than five units presumably would be subject to either the third or fourth priorities.

¹² The following residential development units are exempted from the community housing fee:

1. The redevelopment, remodeling, or relocation of a legally pre-existing residential unit provided no new or additional residential unit is created.
2. The expansion up to five hundred square feet of gross floor area of a legally pre-existing residential dwelling unit.
3. Mobile homes.
4. Skilled nursing facilities.
5. Retirement or assisted living homes.
6. Foster and group homes.
7. Community housing units.

See City of McCall Ordinance No. 820. § 3.8.21(C).

1 spent within five years unless the City has earmarked such funds and extended the time an additional
2 five years. An applicant may also apply for a reduction or waiver of the community housing fee if such
3 person receives income within the Income Categories identified above or believes the residential unit
4 does not relate to the purposes and standards of Ordinance No. 820.

5 Plaintiff argues that Ordinance Nos. 819 and 820 exceed the City's zoning authority because they
6 attempt to regulate ownership as opposed to use of the property. Furthermore, Plaintiff argues that such
7 ordinances violate the general laws of the state because regulations relating to community housing have
8 been preempted by other state law, that such ordinances unconstitutionally control rent, that such
9 ordinances are disguised impact fees, or that they impose illegal taxes.

10
11 *n. Whether the Authority to Implement Affordable Housing has been Impliedly Preempted by State Law*

12 While Article 12, Section 2 of the Idaho Constitution is a grant of local police powers to Idaho
13 cities, this police power is limited in at least two important respects. First, cities cannot act in an area
14 which is so completely covered by general law as to indicate that it is a matter of state concern. Second,
15 cities may not act in an area where to do so would conflict with the state's general laws. *Caesar v. State*,
16 101 Idaho 158, 161, 610 P.2d 517, 520 (1980). Under the doctrine of implied preemption, where a state
17 has acted in an area in such a pervasive manner, it is assumed that the state intended to occupy the entire
18 field of regulation despite the lack of any specific language preempting regulation by local government
19 entities. *Id.* (citing *United Tavern Owners of Philadelphia v. School Dist. of Philadelphia*, 272 A.2d
20 868, 870 (Pa. 1971)).

21
22 In 1967, the Idaho Legislature enacted the Housing Authorities and Cooperation Law at Idaho
23 Code Section 50-1901 *et seq.* By enacting this statute, the Legislature recognized the need for sanitary
24 and safe dwelling accommodations for persons of low income. See Idaho Code Ann. § 50-1902(a).

1 Essentially, a housing authority is created as an independent public body corporate and politic by a
2 resolution of the governing body of the city, but is not an agency of the city. Idaho Code Ann. § 50-
3 1905; see also Idaho Code Ann. § 31-4205 (county housing authorities).¹³ The housing authority is
4 imbued with a number of powers necessary or convenient to carry out and effectuate the purposes and
5 provisions of the act. Specifically, a housing authority has the power to contract with other housing
6 authorities for services, create bylaws, rules and regulations, prepare, carry out, acquire, lease, and
7 operate housing projects, lease or rent dwellings, establish and revise rents, own, hold and improve real
8 or personal property, and acquire real property through eminent domain. Idaho Code Ann. § 50-1904(a),
9 (b), and (d).
10

11 Overall, Chapter 19, Title 50 of the Housing Authorities and Cooperation Law discusses a
12 housing authority's ability to own and acquire real property. Subsection (d) grants the housing authority
13 broad power with respect to leasing, renting, owning, purchasing, acquiring by gift, grant, bequest,
14 devise, or eminent domain, and selling, exchanging, transferring, assigning, pledging or disposing of any
15 real or personal property. Idaho Code Ann. § 50-1904(d). This is quite different from any "interest" the
16 City of McCall may have in a landowner's real property which is required to be earmarked as
17 community housing under the first two priorities of Ordinance No. 819.
18

19 This Court believes that the Idaho Legislature has carefully designated powers within a housing
20 authority in Chapter 19, Title 50 and Chapter 42, Title 31, of the Idaho Code (created either by a city or a
21 county) to address housing problems and provide for affordable housing to low income households.
22 Pursuant to those code sections, a housing authority may acquire real property primarily through two
23 mechanisms: the power of eminent domain and the issuance of bonds upon proper resolution. Idaho
24

25 ¹³ Chapter 19, Title 50 of the Idaho Code which governs city housing authorities is
26 essentially identical to Chapter 42, Title 31 governing county housing authorities.

Code Ann. §§ 50-1914, -1916; 31-4214, -4216. With such bonds, a housing authority may purchase or obtain real property.¹⁴ A housing authority may also acquire real property by gift, grant, bequest or devise. Alternatively, a housing authority may also acquire real property through loans. Idaho Code Ann. §§ 50-1904(i); 31-4204(i). Furthermore, a city or county may lend or donate money to the housing authority. Idaho Code Ann. §§ 50-1909; 31-4209. And the federal government may also loan, contribute or provide grants or other financial assistance to housing authorities. Idaho Code Ann. §§ 50-1923; 31-4223.

If a city or county finds that there exist "insanitary or unsafe" dwelling accommodations or that there is a shortage of safe and sanitary dwelling accommodations available to low income households, "[t]he governing body shall adopt a resolution declaring that there is a need for a housing authority." Idaho Code Ann. §§ 50-1905; 31-4205. Although a city or county is not required to create a housing authority, it seems apparent that if the city or county is faced with a need to address affordable housing, the appropriate mechanism for governing affordable housing is through a housing authority pursuant to either section 50-1901 *et seq.*, or section 31-4201 *et seq.*¹⁵ Essentially, these statutes provide the framework in which local governments are to address affordable housing.

¹⁴ If low income housing is owned by a non-profit organization such as a housing authority, it would be eligible to be exempt from taxation under Idaho Code Section 63-602GG. The Idaho Impact Fee Act, Idaho Code Section 67-8201 *et seq.*, also contains an incentive for affordable housing. Local governments may waive all or part of any impact fees as an incentive for developers to include affordable housing. Idaho Code § 67-8204(10).

¹⁵ By Resolution 10-06, Valley County and Adams County created a county housing authority known as VARHA pursuant to Idaho Code Section 31-4205. Under that section, a county may authorize the creation of a housing authority, with the ability to transact business and exercise powers, pursuant to a proper resolution declaring the need for an authority to function. Resolution 10-06 was adopted on January 23, 2008, signed by the Valley County Commissioners. While the City of McCall did not expressly authorize a city housing authority, it appears to rely on the findings and expertise of VARHA. Prior to the creation of VARHA, the City of McCall passed Resolution 05-19 providing for a community housing policy which was signed by Mayor Kirk L. Eimers on September 22, 2005. Ordinance Nos. 819 and 820

1 In 1972, the Idaho Legislature enacted Idaho Code Section 67-6201 *et seq.*, which created a state
 2 agency, the Idaho Housing and Finance Association, to address the issue of affordable housing.
 3 Essentially, the state housing association is empowered to conduct its business, make and execute
 4 agreements or contracts, and to lease, sell, construct, finance, any housing projects and to establish and
 5 revise rents or charges. Idaho Code Ann. § 67-6206(a), (b), (e), and (f). The state housing association is
 6 also empowered to own, hold and improve real property, purchase, lease, and obtain options upon,
 7 acquire by gift, grant, bequest, devise, eminent domain or otherwise any real property and to sell, lease,
 8 exchange, transfer, assign, pledge, or dispose of such property. Idaho Code Ann. § 67-6206(g), (h).
 9 Housing projects are to be subject to the local planning, zoning, sanitary and building laws, ordinances
 10 and regulations applicable to the locality of the housing projects. Idaho Code Ann. § 67-6209. Similar
 11 to housing authorities, the state housing association has the power of eminent domain and the power to
 12 issue bonds to achieve its purpose of providing affordable housing. Idaho Code Ann. § 67-6206.

14 The Legislature has also created the Idaho Housing Trust Fund for the purpose of providing a
 15 "continuously renewable resource known as a housing trust fund from the private and/or public moneys
 16 to assist low-income and very low-income citizens in meeting their basic housing needs, and that the
 17 needs of very low-income citizens should be given priority." Idaho Code Ann. § 67-8101. The housing
 18 trust funds are to be used to assist a variety of activities, including but not limited to:

- 20 (a) New construction, rehabilitation, or acquisition of housing units for occupancy by low-
income and very low-income households;
- 21 (b) Rent subsidies in new construction or rehabilitated multifamily units for low-income and
very low-income households;
- 22 ...

24
 25 rely on Community Guidelines enacted by VARMA and to the extent that the City of
 26 McCall's Resolution allowed the City of McCall to enact inclusionary zoning
 ordinances, the administration of such ordinances is governed by VARMA.

MEMORANDUM DECISION AND ORDER -- PAGE 17

1 (e) Administrative costs for housing assistance groups or organizations which provide housing
2 when such grant or loan will substantially increase the recipient's access to housing funds
3 other than those available under this chapter;

4 (f) Acquisition of housing units for the purpose of preservation as housing for low-income and
5 very low-income households;

6 Idaho Code Ann. § 67-8103(2). Local governments and local housing authorities may receive assistance
7 from the state housing association. Idaho Code Ann. § 67-8104. Specifically, the Idaho Housing Trust
8 Fund Act applies to low and very low income households; and defines low-income households as those
9 with a median income of more than fifty percent but less than eighty percent of the median income of the
10 area, and very-low income households as those with less than fifty percent of the median income. Idaho
11 Code Ann. § 67-8102(9), (10).

12 The Plaintiff argues the Legislature specifically chose to address affordable housing in separate
13 and distinct statutes. The statutes cited above do not make it an absolute requirement to build affordable
14 housing. Rather, the Plaintiff argues such statutes limit a local government's ability to provide
15 affordable housing through bonds or eminent domain or to offer incentives such as tax or impact fee
16 exemptions to developers. The City of McCall, on the other hand, argues that none of the above statutes
17 prohibit the City from passing legislation to provide for housing that is affordable to the City's
18 workforce. What the above statutes make clear is that the Legislature has enacted provisions both
19 through the Idaho Housing and Finance Association as well as local housing authorities at the city and
20 county level to regulate affordable housing.

21 However, the Idaho Supreme Court has held that "[a] local ordinance which merely goes
22 further than a state statute in imposing additional regulation of a given conduct does not conflict with
23 state law." *Voyles v. City of Nampa*, 97 Idaho 597, 601, 548 P.2d 1217, 1221 (1976). Furthermore,
24 under LLUPA, "[w]henver the ordinances made under this chapter impose higher standards than are
25 under LLUPA, "[w]henver the ordinances made under this chapter impose higher standards than are
26

1 required by any other statute or local ordinance, the provisions of ordinances made pursuant to this
2 chapter shall govern." Idaho Code Ann. § 67-6516. Although there is extensive statutory regulation
3 regarding community or affordable housing for low income households, this Court does not find that the
4 Legislature impliedly preempted the entire field of affordable housing. While such legislation may
5 provide the framework for regulations relating to affordable housing, there is nothing in these statutes
6 which appears to prevent a city from enacting a zoning ordinance with respect to affordable housing.

7 *b. Whether Ordinance No. 819 Operates as an Unauthorized Rent Control Provision*

8 Under Ordinance No. 819, if a developer constructs community housing units as rentals, the
9 developer is required to enter into a Community Housing Agreement which provides the construction
10 specifications, sales and/or rental terms, and the restrictions placed on the units to ensure their
11 permanent affordability and compliance with the Community Housing Guidelines. Such housing is
12 permanently deed-restricted affordable housing subject to the regulations governing potential renters
13 with qualifying income levels. VARHA recommends rental or sale prices to the City of McCall,
14 although the City has the ultimate authority on price or rent restrictions. Such deed restrictions and
15 affordable housing classification remain tied to the property and run with the land to future owners. The
16 City of McCall argues it retains an interest in the deed-restricted community housing through the
17 community housing agreement entered into by the property owners and through the regulations which
18 ensure that such housing remains affordable, thus preserving the governmental interest in such property.
19 Plaintiff argues that such rent restrictions amount to a violation of Idaho Code Section 55-307(2).

20 Idaho Code Section 55-307 provides in pertinent part as follows:

21 A local governmental unit shall not enact, maintain, or enforce an ordinance or resolution
22 that would have the effect of controlling the amount of rent charged for leasing private
23 residential property. This provision does not impair the right of any local governmental
24 unit to manage and control residential property in which the local governmental unit has
25 a property interest.

26 MEMORANDUM DECISION AND ORDER -- PAGE 19

1 Idaho Code Ann. § 55-307(2) (emphasis added). The statute expressly allows a local governmental unit
2 to enact a resolution that would have the effect of controlling rent if the governmental unit has a
3 "property interest" in the residential property. The City argues it has an interest in such affordable
4 housing, explaining that its interest, while not a possessory interest, is a regulatory and administrative
5 interest "applied through VARHA, to maintain the upkeep and usefulness of such affordable housing
6 units and to ensure that such units are utilized only by those individuals qualifying for the low income
7 housing."
8

9 Under Idaho Code Section 50-1904, a city housing authority has the power to "lease or rent any
10 dwellings . . . embraced in any housing project . . . [and] to establish and revise the rents or charges
11 therefor." Idaho Code Ann. § 50-1904(d); see also Idaho Code Ann. § 31-4204(d) (county housing
12 authority). Furthermore, these provisions provide a housing authority with the power to acquire such
13 real property through eminent domain or with funds obtained through issuance of a bond. See Idaho
14 Code Ann. §§ 50-1914, -1916; 31-4214, -4216. A housing authority would clearly have a "property
15 interest" in such property and the authority to control rents. See Idaho Code Ann. §§ 50-1913 and 31-
16 4213. This Court does not conclude that the City of McCall possesses the same interest as a housing
17 authority which owns real property.
18

19 The City of McCall admits it has only a regulatory or administrative interest. This Court is not
20 convinced that such interest amounts to a "property interest" under section 55-307(2). The landowner or
21 developer of affordable housing would retain a property interest subject to regulation. To hold that a
22 local government entity has a property interest in real property when it exercises only a regulatory or
23 administrative function would essentially eviscerate Idaho Code Section 55-307, which prohibits a local
24 government from controlling rent charged for leasing private residential property.
25
26

c. Whether the Ordinances Exact an Unauthorized Tax or are Disguised Impact Fees

Initially a distinction must be drawn with respect to Ordinance Nos. 819 and 820. These ordinances are essentially attempting to provide for affordable housing rather than regulate affordable housing. Although the Court defers to the City of McCall's findings relating to the need for affordable housing and the City's sincere efforts to provide for such, this Court is being asked to decide the constitutionality of the means the City of McCall is utilizing to provide for affordable housing. The City of McCall has meticulously engineered a land use provision which requires landowners and developers to give over something of value in exchange for the right to develop a subdivision or build a residential unit. While the City of McCall argues that Ordinance Nos. 819 and 820 merely regulate the growth of residential housing in McCall, it is undeniable that the stated goals of such ordinances are to provide for "a reasonable supply of affordable, deed restricted workforce housing (community housing)." Such ordinances contemplate that in exchange for approval and issuance of a building permit a landowner or developer must give over something of value, whether it be an agreement to provide deed-restricted inclusionary housing, the conveyance of land, or a fee under Ordinance Nos. 819 or 820. Therefore, this Court must determine whether the City of McCall has authority for exacting such "fee."¹⁴

¹⁴ When the Court uses the term "fee" it is referring to any and all of the priorities listed under Ordinance No. 819, and not merely the "in lieu fee" under the fourth priority. Furthermore, it is understood that under Ordinance No. 820, the community housing fee is a "fee" in any general sense of the word. The Court's analysis is not restricted to the fact that under the first two priorities of Ordinance No. 819, the landowner is not relinquishing control over his or her property. This does not mean that the landowner is not in essence paying a price or a "fee" to the City of McCall for the privilege of subdividing or erecting improvements on his or her land. This Court recognizes the fact that the City of McCall has characterized such requirement as a "subsidy amount," as defined by the provisions for land conveyance and the in lieu fee. See City of McCall Ordinance No. 819, § 9.7.10(A)(4)(e) and § 9.7.10(A)(5)(b). Therefore, it is appropriate for this Court to find that the requirements under any of the four priorities in Ordinance No. 819 constitute a "fee."

1 Municipalities are allowed pursuant to the Idaho Constitution to enact fees or impose taxes to
2 fund projects. Generally, there are two primary ways in which a municipality may impose charges on
3 the public or on particular persons: (1) by legislative enactment which specifically permits the
4 municipality to fund a project through the assessment of taxes or fees; or (2) pursuant to the police
5 power for the collection of revenue incidental to the enforcement of a regulation. See *Idaho Building*
6 *Contractors Ass'n v. City of Coeur D'Alene*, 126 Idaho 740, 742-43, 890 P.2d 326, 328-29 (1995).

7 Article 7, section 6 of the Idaho Constitution expressly provides that a city has the power to
8 assess and collect taxes for all purposes of the city corporation. Idaho Const. Art. 7 § 6. While Article
9 7, section 6 of the Idaho Constitution permits a municipal corporation to assess and collect taxes for the
10 purposes of the corporation, that taxing authority is not self-executing and is limited to that taxing power
11 given to the municipality by the Idaho Legislature. *Id.* at 742, 890 P.2d at 328 (citing *Brewster v. City of*
12 *Pocatello*, 115 Idaho 502, 503-04, 768 P.2d 765, 766-67 (1988)). Neither party has asserted any
13 statutory authority which would permit the City of McCall to impose a tax through Ordinance Nos. 819
14 and 820. In fact, the City of McCall denies that the fees or costs imposed upon landowners in either
15 Ordinance Nos. 819 or 820 constitute a tax. Rather, the City argues such fees are lawful pursuant to its
16 police powers.
17

18 Under Article 12, section 2 of the Idaho Constitution, a municipality may enact regulations
19 pursuant to its police power for the furtherance of the public health, safety, morals, or welfare of its
20 residents. Idaho Const. Art. 7 § 6. Pursuant to those police powers, a municipality may provide for the
21 collection of revenue incidental to the enforcement of a regulation. *Idaho Bldg. Contractors Ass'n*, 126
22 Idaho at 742-43, 890 P.2d at 328-29. However, such municipal fees must be rationally related to the cost
23 of enforcing the regulation and cannot be assessed purely as a revenue-generating scheme. *Brewster v.*
24 *City of Pocatello*, 115 Idaho 502, 504, 768 P.2d 765, 767 (1988). If the fee or charge is imposed
25
26

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1 primarily for revenue raising purposes, it is in essence a tax and can only be upheld under the power of
2 taxation. *Idaho Bldg. Contractors Ass'n*, 126 Idaho at 743, 890 P.2d at 329.

3 The City of McCall argues that Ordinance Nos. 819 and 820 are not revenue raising mechanisms,
4 but rather land use regulations enacted through the City's police powers to control zoning regulations
5 within the City's jurisdiction because such ordinances control a specific use of land and development.
6 Just as the City of Coeur D'Alene argued in *Idaho Building Contractors Association*, the City of McCall
7 argues that Ordinance Nos. 819 and 820 have been enacted for the purposes of promoting the health,
8 welfare, safety, and morals of the residents of McCall. See *Idaho Bldg. Contractors Ass'n*, 126 Idaho at
9 743, 890 P.2d at 329.

10
11 In *Brewster*, the Idaho Supreme Court addressed the validity of an ordinance passed by the City
12 of Pocatello charging a street restoration and maintenance fee upon all owners or occupants of property
13 in the City of Pocatello pursuant to a formula reflecting the traffic which was estimated to be generated
14 by that particular property. *Id.* at 502, 768 P.2d at 765. The Court held that "the revenue to be collected
15 from Pocatello's street fee has no necessary relationship to the regulation of travel over its streets, but
16 rather is to generate funds for the non-regulatory function of repairing and maintaining streets. The
17 maintenance and repair of streets is a non-regulatory function as the terms apply to the facts of the
18 instant case." *Id.* at 504, 768 P.2d at 767. The fee imposed by the ordinance in *Brewster* effectively was
19 a general tax rather than an incidental regulatory fee. "In a general sense a fee is a charge for a direct
20 public service rendered to the particular consumer, while a tax is a forced contribution by the public at
21 large to meet public needs." *Id.* at 505, 768 P.2d at 768.

22
23 Under Ordinance No. 819, the subsidy created either by requiring landowners to deed restrict a
24 percentage of units as community housing, to convey land, or to pay an in lieu fee appears to be an
25 innovative way of creating or generating affordable housing. Quite plainly, even the fees collected

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1 pursuant to Ordinance No. 820 are for the purpose of "planning, subsidizing, developing or constructing
2 community housing." City of McCall Ordinance No. 820, § 3.8.21(E)(4). To be a valid fee, the fee
3 must be incidental to the enforcement of the regulation and bear a reasonable relationship to the cost of
4 enforcing such regulation. *Brewster*, 115 Idaho at 504, 768 P.2d at 767; see also *Forster's Inc. v. Boise*
5 *City*, 63 Idaho 201, 118 P.2d 721 (1941).

6 The City of McCall argues it has specific statutory authority under the LLUPA to require a
7 subsidy under Ordinance No. 819, or a fee under Ordinance No. 820, to provide for safe, affordable
8 housing. Generally speaking, the LLUPA governs zoning regulations such as setbacks, density, and
9 height regulations. See *Spranger, Grubb & Assocs. v. City of Halley*, 127 Idaho 576, 903 P.2d 741
10 (1995). However, as discussed previously, the LLUPA does not provide the City with any authority for
11 enacting ordinances which require that developers provide affordable housing, let alone authority to
12 impose a fee or require a subsidy from landowners to further such goals. To the contrary, LLUPA
13 provides that:

14
15 Fees established for purposes of mitigating the financial impacts of development must
16 comply with the provisions of chapter 82, title 67, Idaho Code. Denial of a subdivision
17 permit or approval of a subdivision permit with conditions unacceptable to the landowner
18 may be subject to the regulatory taking analysis provided for by section 67-8003, Idaho
19 Code, consistent with the requirements established thereby.

20 Idaho Code Ann. § 67-6513. Chapter 82 is the Idaho Development Impact Fee Act,¹⁷ and provides for
21 the imposition by ordinance of development impact fees as a condition of development approval. Idaho

22 ¹⁷ The Idaho Development Impact Fee Act defines "affordable housing" as "housing
23 affordable to families whose incomes do not exceed eighty percent (80%) of the
24 median income for the service area or areas within the jurisdiction of the
25 governmental entity. Idaho Code Ann. § 67-8203(1). Furthermore, the act defines
26 "development requirement" as "a requirement attached to a developmental approval or
other governmental action approving or authorizing a particular development project
including, but not limited to, a rezoning, which requirement compels the payment,
dedication or contribution of goods, services, land, or money as a condition of
approval." Idaho Code Ann. § 67-8203(10). Under section 67-8204,

Code Ann. § 67-8204. A development impact fee is "payment of money imposed as a condition of development approval to pay for a proportionate share of the cost of system improvements needed to serve development." Idaho Code Ann. § 67-8203(9). Such fees "shall not exceed a proportionate share of the cost of system improvements." Idaho Code Ann. § 67-8204(1).

The critical language in the Idaho Development Impact Fee Act is that the purpose of such act is to provide funds necessary for "planning and financing public facilities needed to serve new growth and development . . . necessary . . . to promote and accommodate orderly growth and development and to protect the public health, safety and general welfare." Idaho Code Ann. § 67-8202. Public facilities are defined as water works, waste facilities, roads, streets, and bridges, storm water collection, parks and capital improvements, as well as public safety facilities such as law enforcement, fire, emergency medical and rescue and street lighting facilities. Idaho Code Ann. § 67-8203(24). Ultimately, while the Idaho Development Impact Fee Act allows an exception to imposing a development impact fee on affordable housing, the Act does not contemplate the imposition of development impact fees to ensure an adequate affordable housing supply or to develop such. Therefore, this Court is unable to conclude

A development impact fee ordinance may exempt all or part of a particular development project from development impact fees provided that such project is determined to create affordable housing, provided that the public policy which supports the exemption is contained in the governmental entity's comprehensive plan and provided that the exempt development's proportionate share of system improvements is funded through a revenue source other than development impact fees.

Idaho Code § 67-8204(10). Essentially, a city may provide an incentive for the creation of affordable housing by exempting the development impact fee, provided that such exemption is within the city's comprehensive plan and that such proportionate share of system improvements is funded through another source such as state or federal funding of affordable housing.

If the fees imposed under Ordinance Nos. 819 and 820 are development impact fees, such fees would be contrary to the stated legislative intention to provide an exception to the imposition of such fees under section 67-8204 for the development of affordable housing.

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1 that either such subsidy under Ordinance No. 819, or fee under Ordinance No. 820, is appropriate under
2 the Idaho Development Impact Fee Act.

3 Additionally, the Idaho Supreme Court in *Idaho Building Contractors Association* found that the
4 fee imposed by the city's ordinance "purports to assess a fee to support additional facilities or services
5 made necessary by the development, and to shift the cost of those additional facilities and services from
6 the public at large to the development itself." *Id.* In *Idaho Building Contractors Association*, the City of
7 Coeur D'Alene had enacted an ordinance which required a capitalization fee to pay for a proportionate
8 share of the cost of improvements needed to serve development. The capitalization fee was imposed on
9 all building permits, in an attempt to have growth pay for growth. Relying on the analysis in *Brewster*,
10 the Court held:
11

12 [T]he assessment here is no different than a charge for the privilege of living in the City
13 of Coeur d'Alene. It is a privilege shared by the general public which utilizes the same
14 facilities and services as those purchasing building permits for new construction. The
15 impact fee at issue here serves the purpose of providing funding for public services at
16 large, and not to the individual assessed, and therefore is a tax. The fact that additional
17 services are made necessary by growth and development does not change the essential
18 nature of the services provided: they are for the public at large.

19 *Idaho Bldg. Contractors Ass'n*, 126 Idaho at 744, 890 P.2d at 330 (emphasis added).

20 The Idaho Supreme Court distinguished taxes from fees, stating that "taxes serve the purpose of
21 providing funding for public services at large, whereas a fee serves only the purpose of covering the cost
22 of the particular service provided by the state to the individual." *Id.* (citing *Alpert v. Boise Water Corp.*,
23 118 Idaho 136, 145, 795 P.2d 298, 307 (1990)). Quoting the *Brewster* Court, the Idaho Supreme Court
24 acknowledged its previous holding stating:

25 It is only reasonable and fair to require the business, traffic, act, or thing that necessitates
26 policing to pay this expense. To do so has been uniformly upheld by the courts. *On the*
27 *other hand, this power may not be resorted to as a shield or subterfuge, under which to*
28 *enact and enforce a revenue-raising ordinance or statute.*

29 MEMORANDUM DECISION AND ORDER - PAGE 26

1 *Id.* (quoting *Brewster*, 115 Idaho at 504, 758 P.2d at 767). In *Idaho Building Contractors Association*,
2 the Idaho Supreme Court affirmed the district court's decision holding that the municipal ordinance
3 imposing fees was not authorized by the Development Impact Fee Act and that such fee was essentially a
4 tax providing funding for public services at large. *Id.* at 743-44, 890 P.2d at 329-30.

5 Likewise, the City of McCall is attempting to have growth in McCall pay for growth.
6 Essentially, landowners and developers are being charged a premium, by way of either a subsidy or a fee,
7 to live in the City of McCall. There has been no suggestion that the landowner or developer enjoys some
8 benefit, other than a benefit ostensibly to be realized by the public at large, from paying the subsidy or
9 building permit fee under Ordinance Nos. 819 and 820.¹⁸ While the landowner or developer may be
10 denied a permit to develop a subdivision or build a residential unit if he or she fails to provide the
11 subsidy or pay the fee, the "benefit" he or she receives in subdividing his or her land does not distinguish
12 the subsidy or fee from a tax. Admittedly, the benefit provided is to assure "a reasonable supply of
13 affordable, deed restricted workforce housing (community housing) being made available . . . [to] critical
14 professional workers, essential service personnel, and service workers" who are able to live within
15 proximity to their work. Whatever benefit the landowner receives is no different than a benefit received
16 and shared by the public at large. The lack of affordable workforce housing is a problem for which the
17 public should bear the cost to remedy rather than imposing the burden on a few landowners or
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19
20
21

22 ¹⁸ The City of McCall attempts to argue that the benefit to the landowner is two-
23 fold: (1) assurance that "critical professional workers, essential service
24 personnel and service workers live within proximity to their work to provide
25 municipal and private sector services;" and (2) incentives such as density bonuses,
26 equity builder programs, and priority in sewage and water hookups. The benefit of
essential workforce services is a benefit shared by the public at large. As to the
incentives a landowner receives, such incentives are not clearly outlined in the
ordinances themselves and this Court is not persuaded that such incentives are
provided in exchange for the subsidy or fees paid pursuant to Ordinance Nos. 819 and
820.

1 developers. Therefore, the purpose of the subsidy or fee under Ordinance Nos. 819 and 820 is for the
2 benefit of public services at large rather than a benefit to the individual assessed.

3 The City of McCall urges that this Court's analysis, in determining whether the fees imposed are
4 disguised taxes, should focus on whether the funds collected are disbursed in accordance with the stated
5 purpose of the regulation. However, this step in the analysis should come only after a determination that
6 the City of McCall had authority to impose such fees. In *Loomis v. City of Halley*, 119 Idaho 434, 807
7 P.2d 1272 (1991), and also in *Schmidt v. Village of Kimberly*, 74 Idaho 48, 256 P.2d 515 (1953), the
8 Idaho Supreme Court found that the fees imposed were collected pursuant to the Idaho Revenue Bond
9 Act. Under those circumstances, the Court was required to determine whether the fees were collected
10 under the guise of the Act and allocated and spent otherwise on projects not related to the ordinance.
11 Such is not the situation in the underlying case. Therefore, unless the Court finds the fees imposed
12 under Ordinance Nos. 819 and 820 are properly enacted pursuant to the City's police powers, it need not
13 determine whether such fees are being properly disbursed in accordance with the stated purposes of the
14 ordinances.
15

16 3. Whether Ordinance Nos. 819 and 820 are Unreasonable or Arbitrary
17

18 The third prong under *Hobbs* is to determine whether Ordinance No. 819 is a reasonable or
19 arbitrary enactment. The Plaintiff argues that Ordinance No. 819 operates as a regulation of ownership
20 rather than a land use regulation. As an ordinance regulating a landowner's ownership rather than use, it
21 is an arbitrary and unreasonable exercise of the police powers and violates the constitutional protection
22 given by the due process clause. The Plaintiff relies on *O'Connor v. City of Moscow*, 69 Idaho 37, 202
23 P.2d 401 (1949), for the proposition that a zoning ordinance may only regulate use, not ownership, of
24 property. *Id.* at 43, 202 P.2d at 404 ("A zoning ordinance deals basically with the use, not ownership, of
25 property.")
26

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1 In *O'Connor*, the Court recognized that generally, zoning regulations are divided into two
2 classes: "first, those which regulate the height and bulk of buildings within certain designated districts,
3 and second, those which prescribe the use to which buildings within certain designated districts may be
4 put." *Id.* at 41, 202 P.2d at 403. The City of Moscow attempted to restrict certain businesses to one area
5 of the business district in downtown by adopting an ordinance that provided any change of ownership
6 would constitute a new or additional business. Therefore, any non-conforming business which
7 attempted to sell to a new owner would be prohibited from operating such business as it was a "new or
8 additional" business.

9
10 Specifically, the *O'Connor* Court held that the provision of the ordinance declaring a change of
11 ownership to be a new business was void as being an arbitrary and unreasonable exercise of the city's
12 police power violating the constitutional protections given by the due process clause. *Id.* at 43, 202 P.2d
13 at 404. By enacting an ordinance relating to the business district and the uses of property within certain
14 limits of the city, the City of Moscow was regulating the use of such properties. However, attempting to
15 make a change in ownership a "new business" was arbitrary and unreasonable.

16
17 Likewise, the City of McCall can designate the use of specific property in zoning areas as
18 residential or commercial. However, the City of McCall's requirement that twenty percent of new
19 subdivisions be deed-restricted as community housing regulates much more than a landowner's "use" of
20 his or her property. The restrictions for community housing dictate the price for which the property may
21 be sold and to whom the property may be sold. Even if the landowner builds rental units, the restrictions
22 that twenty percent of the units be community housing also limit how much rent a landowner may charge
23 and to whom the units may be rented. These restrictions go much further than merely regulating the use
24 of property; instead, they essentially regulate ownership of the property by dictating to whom a unit may
25

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MEMORANDUM DECISION AND ORDER - PAGE 29

1 be sold or rented. This Court concludes such "regulation" is arbitrary and unreasonable as a land use
2 provision.

3 This Court is convinced that the imposition of the subsidy or fee required under Ordinance Nos.
4 819 and 820 are, in reality, a tax, and not a regulation. Through such ordinances, the City of McCall has
5 attempted to provide for affordable housing either by requiring developers to pay for such by subsidizing
6 the housing market or by requiring landowners to pay a community housing fee for new residential
7 building permits. There is nothing which regulates the use of land other than requiring a landowner to
8 pay such subsidy or fees. Therefore, this Court finds that Ordinance Nos. 819 and 820 impermissibly
9 exceed the City's police powers as they impose a tax without legislative authority allowing the City of
10 McCall to enact such tax. Furthermore, to the extent that such ordinances attempt to regulate ownership
11 (i.e. restricting a landowner's right to sell or rent lots and units by requiring affordable housing
12 provisions), such ordinances are arbitrary and unreasonable.

14 Given these conclusions, there is no need to address the remaining issues or challenges by the
15 Plaintiff of violation of the Equal Protection Clause, the unconstitutional "taking" analysis, or the ability
16 of the City of McCall to contract with VARHA.
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CONCLUSION

For the foregoing reasons, this Court hereby GRANTS the Plaintiff's Motion for Summary Judgment, finding City of McCall Ordinance Nos. 819 and 820 exceed the City of McCall's police powers as they provide for unauthorized taxes and are, therefore, void and without force and effect. Counsel for Plaintiff shall submit any proposed judgments consistent with this decision, subject to the right of Defendant's counsel to review for form.

AND IT IS SO ORDERED.

Dated this 19th day of February 2008.

Thomas F. Neville
Thomas F. Neville
District Judge

CERTIFICATE OF MAILING

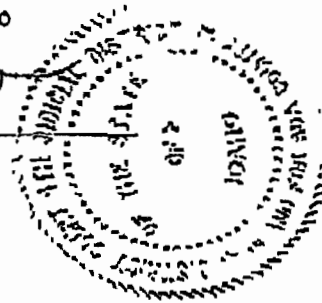
I hereby certify that on this 19 day of February, 2008, I mailed (served) a true and correct copy of the within instrument to:

David Gratton
Victor Villegas
EVANS KEANE LLP
1405 West Main
P.O. Box 959
Boise, Idaho 83701-0959
Telephone: (208) 384-1800
Facsimile: (208) 345-3514

William A. Morrow
Christopher D. Gabbert
Jill S. Holfrka
WHITE PETERSON, P.A.
5700 East Franklin Road, Suite 200
Nampa, Idaho 83687-7901
Telephone: (208) 466-9272
Facsimile: (208) 466-4405

ARCHIE N. BANBURY
Clerk of the District Court
Valley County, Idaho

Deputy Clerk



**EXHIBIT “D”
MCCALL
ORDINANCE NO. 856**

EXHIBIT "D"

ORDINANCE NO. 856

AN ORDINANCE OF THE CITY OF McCALL, VALLEY COUNTY, IDAHO, REPEALING SUBDIVISION AND DEVELOPMENT REGULATIONS CODE, MCC 9.7.10 TO REQUIRE ALL NEW SUBDIVISIONS TO INCLUDE A CERTAIN NUMBER OF COMMUNITY HOUSING UNITS TO BE AFFORDABLE TO THE CITY'S WORKFORCE (ORDINANCE 819), AND REPEALING AN ORDINANCE OF THE CITY OF McCALL, IDAHO AMENDING THE CITY OF McCALL ZONING CODE, MCC 3.8.21, TO REQUIRE A COMMUNITY HOUSING FEE TO BE PAID FOR EACH NEW RESIDENTIAL DWELLING UNIT (ORDINANCE 820) AND PROVIDING AN EFFECTIVE DATE.

BE IT ORDAINED BY THE MAYOR AND CITY COUNCIL OF THE CITY OF McCALL, IDAHO THAT:

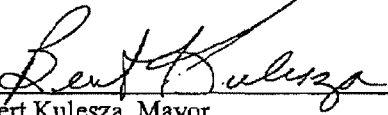
SECTION 1: Enactment. MCC McCall City Code 9.7.10 and 3.8.21, Planning and Zoning is hereby repealed in its entirety as shown in Exhibit A.

SECTION 2: Savings Clause. The repeal of former Ordinance 819 and 820 shall not affect voluntary contributions to community housing as specified in subdivision and zoning map amendment development agreements.

SECTION 3: Effective Date. This ordinance or a summary thereof, shall be published once in the official newspaper of the City, and shall take effect upon its passage, approval, and publication.

PASSED BY THE COUNCIL OF THE CITY OF McCALL, IDAHO, THIS 24th DAY OF APRIL, 2008.

APPROVED BY THE MAYOR OF THE CITY OF McCALL, IDAHO, THIS 24th DAY OF APRIL, 2008.

By 
Bert Kulesza, Mayor

ATTEST:

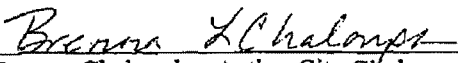

Brenna Chaloupka, Acting City Clerk

EXHIBIT A
Ordinance _____

ORDINANCE NO. 819

AN ORDINANCE OF THE CITY OF McCALL, IDAHO AMENDING THE CITY OF McCALL SUBDIVISION AND DEVELOPMENT REGULATIONS CODE, TITLE 9 TO REQUIRE ALL NEW SUBDIVISIONS TO INCLUDE A CERTAIN NUMBER OF COMMUNITY HOUSING UNITS TO BE AFFORDABLE TO THE CITY'S WORKFORCE, PROVIDE FOR A SEVERABILITY CLAUSE AND PROVIDE AN EFFECTIVE DATE.

WHEREAS, the Housing Component of the McCall Area Comprehensive Plan includes the following objectives:

- o Prepare for the housing impact of major development proposals and expansions on the City of McCall, its impact area, and surrounding vicinity;
- o Encourage or provide for affordable housing; and

WHEREAS, the health, safety and welfare of the citizens of the City of McCall is dependent upon a reasonable supply of affordable, deed restricted workforce housing (community housing) being made available to ensure that critical professional workers, essential service personnel, and service workers live within proximity to their work to provide municipal and private sector services; and

WHEREAS, the City of McCall has determined through public input and the comprehensive planning process that a reasonable supply of community housing is needed to promote the social and economic diversity of the City; and

WHEREAS, the economic vitality and well-being of the citizens of the City of McCall is dependent upon a reasonable supply of community housing, and that persons such as medical personnel, peace officers, emergency personnel, fire personnel, and providers of other professional services, which are vital to the community, are dependent upon the availability of community housing; and

WHEREAS, to advance these objectives the City, in partnership with Valley County, Adams County, and the communities of Cascade, Donnelly, and New Meadows, commissioned a Housing Market and Needs Assessment for Valley and Adams County (Housing Needs Assessment) that was completed July, 2005; and

WHEREAS, the Housing Needs Assessment determined that 210 community housing units are currently needed in Valley and Adams Counties, including 145 low to moderate income homes for families earning 50 to 100% of annual median income and 65 moderate to middle income homes for families earning 100 to 160% of annual median income; and

WHEREAS, the Housing Needs Assessment determined that 200 additional homes are needed in Valley and Adams Counties in the next two years, including 138 low to moderate income homes and 62 moderate to middle income homes; and

WHEREAS, the Housing Needs Assessment determined that housing is needed for the families of a significant number of the 700 to 1,000 construction workers estimated to be working in Valley and Adams Counties and commuting to their homes elsewhere, reducing the vitality of the local economy; and

WHEREAS, the Housing Needs Assessment determined that the total number of units needed to catch up with demand in Valley and Adams Counties is between 550 and 610 units of Community Housing; and

WHEREAS, the City of McCall encompasses approximately 20% of the region's population and employment; and

WHEREAS, 20% of the housing needed to catch up with demand, as identified in the Housing Needs Assessment is 110 to 122 homes, including 76 to 84 low to moderate income homes and 34 to 38 moderate to middle income homes; and

WHEREAS, the City of McCall is presently comprised of approximately 40% year round primary residences and approximately 60% seasonally-occupied homes; and

WHEREAS, the City of McCall desires to maintain the current ratio of year round primary residences to seasonally-occupied homes as the community grows; and

WHEREAS, the McCall City Council held housing policy discussions at City Council meetings on July 14, 2005 and August 11, 2005; held public information sessions on housing policy on August 20, 2005 and August 23, 2005, and held public hearings on a proposed Housing Policy on September 7, 2005 and September 22, 2005; and

WHEREAS, to assure the existence of a supply of desirable and affordable housing for persons currently employed in the McCall area, persons who were employed in the McCall area prior to retirement, the disabled, and other qualified persons of the McCall area, the City of McCall adopted the following Community Housing Policy (Resolution 05-19) on September 22, 2005:

1. Responsibility
 - 1.1. The City of McCall is responsible for developing and implementing a community housing program to meet the needs of its citizens.
 - 1.2. The City of McCall will develop and implement this program in partnership with other local, state, and federal agencies.
 - 1.3. The City of McCall will regularly refine its community housing policy to reflect new information and changing market conditions.
2. Seasonal/Year Round Housing Mix

- 2.1. McCall's Community Housing Program will be designed and implemented to maintain the ratio (60/40) of seasonally-occupied homes to year round primary residences as the community grows.
3. Intended Beneficiaries
 - 3.1. McCall's Community Housing Program will be designed to benefit:
 - 3.1.1. Low, moderate, and middle income families
 - 3.1.2. Local workers
 - 3.1.3. Senior citizens
 - 3.1.4. Special needs populations
4. Income Targets
 - 4.1. The policy will develop housing targeted to meet the needs of the following household types:
 - 4.1.1. Low Income – 50% of median income
 - 4.1.2. Moderate Income – 80% of median income
 - 4.1.3. Middle Income – 160% of median income
5. Job/Housing Relationship
 - 5.1. Community housing will be developed primarily for people with jobs in the community.
 - 5.2. McCall will house at least 50 percent of its workforce within city limits.
6. Production Goals
 - 6.1. To keep up with demand and eliminate our community housing backlog within ten years, McCall is committed to providing:
 - 6.1.1. 43 additional low to moderate income homes annually
 - 6.1.2. 22 additional moderate to middle income homes annually
 - 6.1.3. Senior and special needs housing in quantities to be determined
7. Ownership/Rental Mix
 - 7.1. McCall will develop community housing to maintain at least 65 percent owner occupied housing within the year round resident community.
8. Location/Unit Type
 - 8.1. Community housing requirements for new development will be met within the geographic boundaries of new development to the extent possible.
 - 8.2. Mixed use projects will be encouraged to incorporate community housing into commercial and industrial areas.
 - 8.3. Public community housing resources will focus on infill and redevelopment to:
 - 8.3.1. Maintain and enhance existing neighborhoods;
 - 8.3.2. Promote a jobs-housing balance;
 - 8.3.3. Reduce reliance on the automobile; and
 - 8.3.4. Promote smart growth principals and reduce sprawl.
9. Design and Quality
 - 9.1. Community housing is civic architecture and reflects the values of the community.
 - 9.2. Community housing should be designed to fit its context.
 - 9.3. Design within budget is a characteristic of good design; and

WHEREAS, Resolution 05-19 directs staff to develop ordinances to implement the Community Housing Policy for consideration by the Planning & Zoning Commission and the City Council, including an Inclusionary Housing Ordinance; and

WHEREAS, 24% of the City's households have incomes between 100% and 160% of the area median income, and these households can no longer afford housing in McCall; and

WHEREAS, the best available data indicates that the average price of a home for sale in McCall currently exceeds \$300,000; and

WHEREAS, the best available data indicates that the growth of the area as a resort community will continue to fuel rising housing prices while concurrently increasing the demand for a workforce that can not afford housing; and

WHEREAS, the best available data indicates that approximately 15% of the families currently residing in McCall have sufficient income to afford the mortgage payments of a \$300,000 home; and

WHEREAS, the development and construction of residential dwelling units create the need for local employees to service and maintain the dwelling units, and the residents thereof; and

WHEREAS, some form of community housing assistance and requirements are needed to maintain a local workforce;

NOW, THEREFORE, BE IT ORDAINED BY THE MAYOR AND CITY COUNCIL OF THE CITY OF McCALL, IDAHO THAT:

SECTION 1: Title 9, McCall Zoning Code is hereby amended by adding Section 9.7.10, Inclusionary Housing, to read as follows:

9.7.10 INCLUSIONARY HOUSING

A Twenty (20) percent of the lots and houses in all subdivisions, including condominium subdivisions, approved and platted after the adoption date of this Section shall be permanently restricted as community housing to be affordable to City of McCall households with incomes in categories III and IV as defined in subsection 2, Community Housing by Income, below.

1. Options for Providing Community Housing

An applicant for subdivision approval may propose and the City Council may approve, pursuant to the priorities and criteria established below, any of four (4) options, or combination thereof, to provide Community Housing that is required by this Section.

- a. First priority is for the applicant to build community housing on the site of the subdivision.
- b. Second priority is for the applicant to build community housing off site of the subdivision.
- c. Third priority is for the applicant to convey land for community housing.
- d. Fourth priority is for the applicant to pay a fee-in-lieu for community housing.

2. Community Housing by Income Category

Fifty (50) percent of the required community housing lots and/or housing units shall be affordable to households in each of the two (2) income categories below.

- a. Category III includes households earning more than one hundred (100) percent but not more than one hundred twenty (120) percent of the Valley County median household income.
- b. Category IV includes households earning more than one hundred twenty (120) percent but not more than one hundred sixty (160) percent of the Valley County median household income.
- c. The median household income for Valley County is derived and annually updated by the U. S. Department of Housing and Urban Development.

3. On Site Community Housing

Community housing units shall be constructed on the site of the subdivision in such a manner as to create an integrated subdivision unless the City Council finds the provision of on-site community housing is impractical by making one (1) or more of the following findings.

- a. The Inclusionary Housing Plan proposed by the applicant includes constructing on-site community housing, constructing off-site community housing, and/or land conveyance and this plan is found by City Council to be in conformance with the City of McCall Comprehensive Plan and Housing Policy.

- b. The community housing units are subject to federal and/or state financial assistance and the on-site location cannot comply with the terms and conditions of the financial assistance.
- c. The number of required community housing units results in less than one (1) housing unit.
- d. The community housing units located on-site would be incompatible with the surrounding lands because of conflicting uses, site plan design or bulk.

4. Off Site Community Housing

If the City Council finds that constructing some or all of the required on-site community housing is impractical, community housing shall be constructed off-site from the subdivision unless the City Council determines that land conveyance better achieves community housing goals. The proposed off-site location shall be suitable for community housing by complying with all of the following standards.

- a. Development of community housing at the "off-site" location will comply with the goals of the City of McCall Housing Policy.
- b. The community housing units can be designed and built in a way that is compatible with surrounding land uses.
- c. Community housing at the "off-site" location will comply with applicable Zoning and Subdivision Code requirements.
- d. The density permitted on the subdivision site may be devoted fully to free-market lots and the off-site community housing units shall be included in the total number of subdivision lots when calculating the community housing requirement.
- e. The number of community housing units constructed off-site shall be provided in an amount equal to:
 - a. 125 percent of the amount which would have been required had it been provided on-site if the off-site housing is within the city limits of the City of McCall. If only a portion of the required Community Housing is off-site, only that portion shall be subject to the 125% factor.
 - b. 150 percent of the amount which would have been required had it been provided on-site if the off-site housing is within the city limits of another municipality located in Valley or Adams County. If only a portion of the required Community Housing is off-site, only that portion shall be subject to the 150% factor.

- c. 200 percent of the amount which would have been required had it been provided on-site if the off-site housing is within unincorporated Valley or Adams County. If only a portion of the required Community Housing is off-site, only that portion shall be subject to the 200% factor.

5. Land Conveyance

If the City Council finds it is impractical to construct on-site community housing and determines a land conveyance for community housing better serves the City's community housing goals than the construction of off-site community housing, the conveyance of land for community housing may be accepted pursuant to the following standards.

- a. The land shall provide for community housing in appropriate locations by complying with the following.
 - 1) Community housing on the land shall comply with the goals of the City of McCall Housing Policy.
 - 2) The land shall be near existing or planned employment centers, schools and commercial services.
 - 3) Housing on the site shall comply with applicable Zoning and Subdivision Code requirements.
 - 4) Notwithstanding this subsection, the Council may accept land that does not meet these criteria if the sale of the land is anticipated pursuant to subsection e, below.
- b. The fair market value of the land shall equal the total subsidy amount for the number of required community housing units as calculated in Section 9.7.10.A.4.e as the subsidy amount is calculated by the City Community Development Director pursuant to the Community Housing Guidelines, as amended.
 - 1) A professional real estate appraiser licensed to practice in Idaho shall establish the fair market value of the land to be conveyed.
 - 2) Fair market value shall be established on a preliminary basis at the time the Inclusionary Housing Plan (subsection 9.0 below) is reviewed.

- 3) Fair market value shall be confirmed at the time of review and approval of the final subdivision plat for the free market portion of the subdivision.
 - 4) Fair market value shall be net of any customary real estate commissions for the sale of the land.
- c. The land conveyance shall occur prior to the City signing the final plat verifying subdivision approval, unless the City Council approves other arrangements with financial assurances.
 - d. The land conveyed shall be used for the development of community housing units or conveyed pursuant to subsection e, below.
 - e. The City Council is permitted to sell land conveyed for community housing if:
 - 1) All proceeds from the sale of the land are placed in the Community Housing Trust Account (subsection 11.0 below); and,
 - 2) The proceeds from the sale of the land and any interest accrued thereon are used only for subsidizing or constructing community housing within a reasonable period of time.

6. In Lieu Fee

The City Council shall accept an in lieu fee for any fraction of a required community housing unit. The fee shall be calculated and collected pursuant to the following standards.

- a. The fee shall be calculated by averaging the subsidy amounts for providing a community housing unit in each of the two (2) Income Categories III and IV. The fee amount shall be proportionate to the fraction of the community housing unit required. The subsidy amounts for each Income Category shall be calculated by the Community Development Director pursuant to the Community Housing Guidelines, as amended.
- b. Prior to September 30, 2006, and on or before September 30 of each following year, the subsidy amount used in the in lieu fee calculation shall be evaluated by the Community Development Director, and if necessary, adjusted to reflect current land and construction costs and the current median income.

- c. The in lieu fee shall be paid prior to the City signing the final plat verifying subdivision approval, unless the City Council approves other arrangements with financial assurances. In lieu fees shall be deposited into a separate account pursuant to subsection 11, Community Housing Trust Account.

7. Deed Restrictions

The lots and houses for community housing shall be permanently deed restricted as to the initial and resale price, minimum size and construction standards, and qualifications of buyers and renters, pursuant to the Community Housing Guidelines, as amended. Provided however, if within nine (9) months after a community housing unit is first available for sale there are no qualified purchasers of the unit, the City Council shall, upon request of the developer, remove the community housing deed restrictions and the unit may be sold by the developer at a market price.

As an alternative to permanent deed restriction, an applicant may request that up to twenty five (25) percent of the lots and houses be subject to an "Equity-Builder" program pursuant to the Community Housing Guidelines.

8. Timing of Occupancy

All community housing units shall be ready for occupancy, or their construction costs bonded and a specific timeline approved by the City Council, no later than the date of the initial occupancy of the free-market portion of the residential subdivision for which the community housing is required. If the subdivision is approved for phased development, the community housing units may be constructed, or bonded with an approved timeline, in proportion to the phases of the subdivision.

9. Inclusionary Housing Plan

An applicant for subdivision approval shall submit an Inclusionary Housing Plan concurrently with the initial application submittal for the subdivision. The Inclusionary Housing Plan shall be prepared and reviewed pursuant to the following standards.

- a. The Inclusionary Housing Plan shall include the following:

- 1) The calculation of the number of community housing units required.
- 2) The proposed method of providing community housing (on-site, off-site, conveyance of land and/or payment of an in lieu fee) and the appropriate justification.
- 3) If community housing units are to be constructed, the Plan shall include:
 - (a) A conceptual site plan and building floor plan illustrating the number of community housing units proposed their location in relation to the other development on the site and surrounding land uses, and the number and size of bedrooms and square footage of each unit.
 - (b) A tabular summary of the number of community housing units, the number and size of bedrooms of each unit, the rental/sale mix, and the sales price or rent for each unit.
 - (c) The proposed restrictions to be placed on the community housing units to ensure they remain affordable and comply with the Community Housing Guidelines, as amended.
- 4) If payment of an in lieu fee is proposed, the Plan shall include the amount of the fee to be paid and the supporting calculations.
- 5) If land is to be conveyed, the Plan shall include:
 - (a) A survey depicting the location, size and topography of the land proposed for conveyance.
 - (b) A title report demonstrating clear title, physical and legal access, liens, easements, and other information necessary to fully describe the legal status of the property.
 - (c) Verification that conditions of the land, any restrictions on title to the land (such as covenants and easements) and the applicable Land Use Codes allow the development of residential units on the land, and that the site generally can be developed for community housing.

- (d) An appraisal of the fair market value of the land.
- (e) Any additional information or studies determined by the Community Development Director to be necessary to verify the suitability of the land for development.

6) Community Housing Agreement

The agreement by a developer to implement the Plan shall be established in a Community Housing Agreement. The Agreement shall be in a form approved by the City Attorney and shall include the following:

- (a) If the Plan proposes the construction of community housing units, the Agreement shall identify: the location, number, type and size of community housing units to be constructed; sales and/or rental terms; occupancy requirements; a timetable for completion of the units; construction specifications; and the restrictions to be placed on the units to ensure their permanent affordability and compliance with the Community Housing Guidelines, as amended.
- (b) If the Plan proposes the conveyance of land, the Agreement shall identify the land to be conveyed, its fair market value, and the time at which the land will be conveyed to the City.
- (c) If the Plan proposes the payment of an in lieu fee, the Agreement shall identify the amount of the fee to be paid, and the time of payment.
- (d) If the Plan proposes a combination of methods (construction of units, conveyance of land, or in lieu fee), the Agreement shall identify the appropriate provisions for each method of mitigation.

b. Review of the Inclusionary Housing Plan

- 1) The procedures for review of the Inclusionary Housing Plan shall be the same as for the subdivision application with which it is submitted.
- 2) The Plan shall be approved, approved with conditions, or disapproved by the Planning & Zoning Commission and the City Council, based on the standards of this Section. A decision on the Plan shall be made prior to a decision on

the residential subdivision with which it is submitted. A subdivision plat shall not be approved without an Inclusionary Housing Plan approved pursuant to the procedures and standards of this Section.

- 3) An approved Inclusionary Housing Plan may be amended or modified only in accordance with the procedures and standards established for its original approval.

10. Community Housing Guidelines

The construction and occupancy of all community housing units shall comply with the Community Housing Guidelines, as amended from time to time by the City Council. If any conflict should arise between the Community Housing Guidelines and this Ordinance, the provisions contained in this Ordinance shall control.

- a. All community housing units constructed pursuant to this Section shall comply with the sales and/or rental terms, appreciation rates, housing type, and occupancy requirements of the Community Housing Guidelines, as amended.
- b. All community housing units shall comply with the size, materials and design requirements and construction standards of the Community Housing Guidelines, as amended.
- c. All community housing units shall comply with all other requirements of the Community Housing Guidelines, as amended, to ensure they are maintained, occupied and owned/rented as community housing units.

11. Community Housing Trust Account

- a. For the purpose of ensuring that any fees collected pursuant to this section are spent for community housing and consequently benefit the fee payers, an interest-bearing Community Housing Trust Account shall be established.
- b. All fees collected pursuant to this section shall be immediately deposited into the Community Housing Trust Account.
- c. All proceeds in the Community Housing Trust Account not immediately necessary for expenditure shall be invested in an interest-bearing account. All income derived from these investments shall be retained in the trust account until spent or refunded.

- d. All funds deposited into the Community Housing Trust Account and accrued interest shall be expended only for the purposes of planning, subsidizing or developing community housing units in McCall.

12. Refund of In Lieu Fee

- a. A fee collected pursuant to this section and three (3) percent interest compounded annually, shall be returned upon written request, to the developer of the subdivision for which a fee was paid if the fee has not been obligated within five (5) years from the date the fee was paid. Notwithstanding, if the City Council has earmarked the funds for expenditure on a specific community housing project, the Council may extend the time period by up to five (5) additional years.
- b. To obtain the refund, the developer must submit a written request to the Community Development Director within one (1) year from the end of the fifth (5th) year from the date payment was received, or within one (1) year from the end of the time this refund requirement is extended by the City Council. Said request shall be accompanied by proof of ownership of the property at the time the refund is requested or contract or option to purchase at the time the refund is requested, and a copy of the receipt verifying payment of the fee.
- c. For the purpose of this Section, fee payments shall be deemed spent in the order in which they are paid. The first (1st) payment made shall be the first (1st) payment spent.

13. Adjustments

- a. The requirements of this section 9.7.10 may be adjusted or waived by the City Council if the developer demonstrates and the Council finds that there is no reasonable relationship between the housing impact of the proposed residential subdivision and the requirements of this section.
- b. The developer shall have the burden of providing economic information or other data and evidence necessary to establish that the housing impact of the proposed residential subdivision has no reasonable relationship to the requirements of this chapter.
- c. The developer must make said demonstration concurrently with the first submittal of an application for the residential subdivision.

- d. The City Council shall make the determination to adjust or maintain the requirements of this section concurrently with the initial decision to approve or deny the proposed residential subdivision.

SECTION 2 Severability.

In the event that any court of competent jurisdiction enters its judgment or order declaring any portion of Section 9.7.10 to be invalid, then such judgment shall only affect that portion of the ordinance so adjudicated, and all other remaining portions shall remain in full force and effect.

EFFECTIVE DATE

Regularly passed, approved and adopted by the Mayor and City Council of the City of McCall, Idaho, this 3rd day of February, 2006.

(seal)



W. A. [Signature]
Mayor

ATTEST:

Joanne E. York
City Clerk

**A SUMMARY OF ORDINANCE NO. 819
PASSED BY THE CITY OF McCALL, IDAHO**

AN ORDINANCE OF THE CITY OF McCALL, IDAHO AMENDING THE CITY OF McCALL SUBDIVISION AND DEVELOPMENT CODE, TITLE 9 TO REQUIRE ALL NEW SUBDIVISIONS TO INCLUDE A CERTAIN NUMBER OF COMMUNITY HOUSING UNITS TO BE AFFORDABLE TO THE CITY'S WORKFORCE.

The principal provisions of Title 9 by adding Section 9.7.10, Inclusionary Housing, requires as follows:

- Provides for Inclusionary Housing, which provides for at least twenty percent of the housing to be affordable community housing and provides options for providing the community housing.
- Provides for Community Housing by Income Category, which requires that a minimum of twelve (12) percent of the community housing lots and/or housing units to be affordable.
- Provides for a Community Housing On Site section.
- Provides for a Community Housing Off Site section.
- Provides for a Land Conveyance section.
- Provides for a Fee In Lieu section, which provides that a fee shall be calculated and collected according to certain standards.
- Provides for a Deed Restriction section and includes a provision for a nine (9) month period if within this time period there are no qualified buyers of the unit that the City Council may remove the community housing deed restrictions.
- Provides for a Timing of Occupancy section.
- Provides for an Inclusionary Housing Plan that provides for calculation of the number of housing units required and review of the inclusionary housing plan.
- Provides for a Community Housing Guidelines section.
- Provides for a Community Housing Trust Account section to ensure the fees collected benefit the fee payers; that the fees are deposited into the trust account, and to allow for an interest-bearing account and for accrued interest.
- Provides for a Refund of In Lieu Fee section.
- Provides for an Adjustments section.

The Ordinance shall be effective upon publication of this Summary.

The full text of the Ordinance is available for review at City Hall and will be provided by the City Clerk to any citizen upon personal request. The full text is also available online at www.mccall.id.us.

APPROVED BY THE COUNCIL OF THE CITY OF McCALL, IDAHO, THIS 9th DAY
OF March, 2006.



Attest:

Approved:

By: [Signature]
Mayor

By: Joanne E. York
City Clerk

mrgWA\Work\M\McCall, City of 21684\2006 Ordinances\Sum Ord Inclusionary Housing Title 9 Subdiv & Devlpmt Code 03 01 06.doc

**EXHIBIT “E”
FIRST AMENDMENT TO
DEVELOPMENT AGREEMENT,
ALPINE VILLAGE PLANNED
UNIT DEVELOPMENT**

EXHIBIT "E"

Instrument. 334281
VALLEY COUNTY, CASCADE, IDAHO
8-20-2008 12:15:34 No. of Pages: 4
Recorded for: CITY OF MCCALL
ARCHIE N. BANBURY Fee: 0.00
Ex-Officio Recorder Deputy
Index to: MISCELLANEOUS RECORD

Recording Requested By and
When Recorded Return to:

City Clerk
City of McCall
216 East Park Street
McCall, Idaho 83638

For Recording Purposes Do
Not Write Above This Line

FIRST AMENDMENT TO DEVELOPMENT AGREEMENT ALPINE VILLAGE PLANNED UNIT DEVELOPMENT

This First Amendment to Development Agreement (the "First Amendment") is entered into effective this 24 day of July, 2008, by and between the City of McCall, a municipal corporation of the State of Idaho, hereinafter referred to as the "City", and Alpine Village Company, hereinafter referred to as "Alpine Village", whose address is 1101 W. River Street, Suite 300, Boise, Idaho, 83702, and who is the owner of the Alpine Village Planned Unit Development (the "PUD"), as the same is platted of record with Valley County, Idaho.

WHEREAS, the City and Alpine Village entered into Development Agreements recorded January 1, 2008, as Instrument No. 328801, and recorded February 2, 2008, as Instrument No. 329168, said Agreements are superseded and replaced in their entirety by that certain Development Agreement, which was filed of record with the Office of Recorder of Valley County, Idaho on April 7, 2008, as Instrument No. 330524 (the "Agreement").

WHEREAS, the Agreement included a Community Housing Plan and contained provisions requiring Alpine Village to provide Community Housing pursuant to McCall City Ordinance No. 819 (the "Ordinance").

WHEREAS, the Ordinance has been declared void by means of that certain Memorandum Decision and Order Granting Plaintiff's Motion for Summary Judgment, which was rendered by the District Court of the Fourth Judicial District of the State of Idaho in Valley County Case No. CV 2006-490-C.

WHEREAS, the Ordinance has been repealed by the City.

WHEREAS, the parties have agreed that the Agreement should be amended to eliminate the Community Housing Plan and any requirements that Alpine Village provide Community Housing Units. The 8 Units approved as Community Housing Units can be sold as Market Rate Units.

WHEREFORE, the City of McCall and the Alpine Village do agree to amend and modify the Agreement, as follows:

1. Community Housing.

Article VII of the Agreement shall be deleted in its entirety and Alpine Village shall be and hereby is released from any requirement to provide Community Housing for or related to the PUD. Exhibit "B" to the Agreement is deleted in its entirety.

2. Continuing Effect of the Agreement.

Except as expressly modified by the terms of this First Amendment, the Agreement shall remain fully in force and binding on the parties according to its terms.

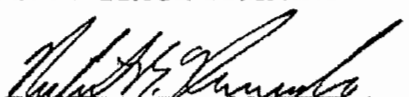
3. Miscellaneous.

After its execution, this First Amendment shall be recorded in the office of the Valley County Recorder, at the expense of Alpine Village. Each commitment and covenant contained in this First Amendment shall constitute a burden on, shall be appurtenant to, and shall run with the PUD Property. This First Amendment shall be binding on the City and Alpine Village and their respective heirs, administrators, executors, agents, legal representatives, successors and assigns.

IN WITNESS WHEREOF, the parties have hereunto caused this First Amendment to be executed, effective on the day and year first above written.

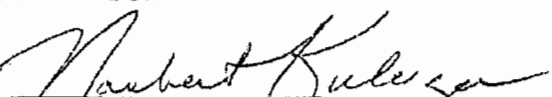
ALPINE VILLAGE COMPANY

By:


Michael B. Hormaechea, President


CITY OF MCCALL

By:


Norbert Kulesza, Mayor

ATTEST:

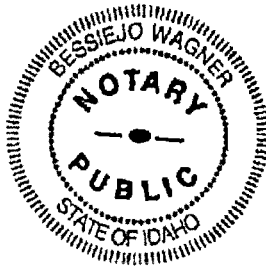
By:


Brenna Chaloupka, Acting City Clerk

STATE OF IDAHO,)
 (ss.
County of Valley.)

On this 24 day of July, 2008, before me, Bessie Jo Wagner a
Notary Public in and for said State, personally appeared Norbert Kulesza
known or identified to me to be the **Mayor of the City of McCall**, who executed the said
instrument, and acknowledged to me that said municipality executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal,
the day and year in this certificate first above written.

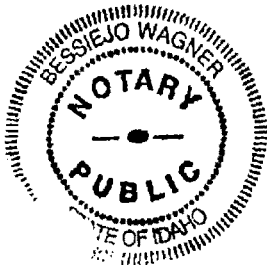


Bessie Jo Wagner
NOTARY PUBLIC FOR IDAHO
My Commission Expires: 5/21/14

STATE OF IDAHO,)
 (ss.
County of Valley.)

On this 30 day of July, 2008, before me, Bessie Jo Wagner, a
Notary Public in and for said State, personally appeared Brenna Chaloupka
known or identified to me to be the **Acting City Clerk of the City of McCall**, who executed the
said instrument, and acknowledged to me that said municipality executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal,
the day and year in this certificate first above written.

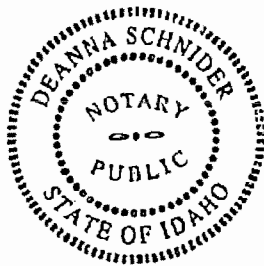


Bessie Jo Wagner
NOTARY PUBLIC FOR IDAHO
My Commission Expires: 5/21/14

STATE OF IDAHO,)
 (ss
County of Valley.)

On this 16th day of June, 2008, before me, Deanna Schneider, a
Notary Public in and for said State, personally appeared **Michael B. Hormaechea**, President of
ALPINE VILLAGE COMPANY, known or identified to me to be the person whose name is
subscribed to the within instrument and acknowledged to me that he executed the same for and on
behalf of said Limited Liability Company.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the
day and year in this certificate first above written.



Deanna Schneider
NOTARY PUBLIC FOR IDAHO
My Commission Expires: 8-20-2013

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

ARCHIE N. BANBURY, CLERK
BY: *[Signature]* DEPUTY
AUG 26 2011

Case No. _____ Inst. No. _____
Filed _____ A.M. _____ P.M.

ALPINE VILLAGE COMPANY,

Plaintiff,

v.

CITY OF MCCALL,

Defendant.

Case No. 1:11-CV-00287-BLW

**MEMORANDUM DECISION AND
ORDER**

INTRODUCTION

The Court has before it Plaintiff's Motion to Remand to State Court. Dkt. 8. Having reviewed the Motion and Defendant's response, the Court has determined that the Motion is suitable for disposition without oral argument. For the reasons explained below, the Court will grant the Motion. Defendant's Motion to Dismiss will therefore be denied as moot. See Dkt. 4.

FACTUAL BACKGROUND

This action concerns Plaintiff Alpine Village Company's claim that its compliance with a City of McCall ordinance requiring development of community housing constituted an unconstitutional taking without just compensation. Defendant City of McCall implemented Ordinance 819 in February 2006. It required real estate developers

MEMORANDUM DECISION AND ORDER - 1

Certified to be a true and correct
copy of original filed in my office.
Elizabeth A. Smith, Clerk
United States Courts, District of Idaho
By: *[Signature]* Deputy
Dated 8/25/2011

to provide "community housing units" equal to twenty percent of the total units in any new residential development. *See Pl's Mtn. to Remand, Milleman Aff.* at 112-25, Dkt. 8-4. Alpine Village Company, developers of the Alpine Village project in downtown McCall, proposed compliance with the Ordinance primarily through purchase and conversion of "the Timbers" apartment complex into deed restricted community housing condominiums. The City approved the proposal, and Alpine Village purchased the Timbers, paying \$2,100,462 in cash. *Pl's Memo in Support of Mtn. to Remand* at 4, Dkt. 8-1.

On April 24, 2008, the City of McCall repealed the Ordinance in response to unrelated litigation. The City and Alpine Village subsequently amended the Timbers development plan, releasing Alpine Village from any obligation to provide community housing. Alpine Village, however, remains the owner of the Timbers.

Alpine Village brought suit against the City of McCall in Idaho state court, alleging a violation of the Fifth Amendment's Takings Clause as well as a violation of the analogous provision of the Idaho state constitution. The City removed the case to this Court on the basis of federal question jurisdiction, and then filed a motion to dismiss. Alpine Village now moves to remand the case for lack of subject matter jurisdiction.

LEGAL STANDARD

A defendant may remove a civil action from state court to federal district court if the district court has original jurisdiction over the matter. 28 U.S.C. § 1441(a). Section 1447 governs this Court's procedure after removal. Section 1447(c) provides that "[i]f at

any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.” There is a strong presumption against removal to federal court: “Federal jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance.” *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992) (per curiam) (citations omitted). The “burden of establishing federal jurisdiction is on the party seeking removal, and the removal statute is strictly construed against removal jurisdiction.” *Prize Frize, Inc. v. Matrix Inc.*, 167 F.3d 1261, 1265 (9th Cir. 1999).

ANALYSIS

1. Motion to Remand

Alpine Village's Complaint contains, on its face, a federal question because it alleges that the City of McCall violated the Takings Clause of the Fifth Amendment. *See Notice of Removal, Exhibit B, Dkt. 1-2, ¶ 26*. However, the Court finds that it lacks subject matter jurisdiction under the ripeness doctrine laid out in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). Therefore, the action must be remanded to state court. *See* 28 U.S.C. § 1447(c).

A. Federal Claim

Ripeness is a required element of subject matter jurisdiction. *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1122 (9th Cir. 2010). A federal takings claim is not ripe for review until two conditions are met: (1) the regulating agency “has reached a final decision regarding the application of the regulations to the property at issue”; and (2) the plaintiff has pursued compensation for the taking through the procedures provided

by the state. *Williamson County*, 473 U.S. at 186, 194. The exhaustion of state remedies is required because “[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation.” *Id.* at 194. The federal courts cannot evaluate an allegation of constitutionally inadequate compensation before a property owner has sought compensation from the state.

The parties agree that the final decision prong of *Williamson County* is not at issue in this case. The parties also agree that, because of the removal of the action to this Court, the plaintiff has not exhausted state remedies for its taking claim, as required under the second prong of *Williamson County*.¹ *Pl’s Memo in Support of Mtn. to Remand* at 8-10, Dkt. 8-1; *Def.’s Resp. to Mtn. to Remand* at 2, Dkt. 19.

This Court must remand to state court if it lacks subject matter jurisdiction over Alpine Village’s claim. 28 U.S.C. § 1447(c). In its brief supporting its Motion to Dismiss, the City initially argued that this Court should apply *Williamson County* ripeness requirements to Alpine City’s claim. *Def’s Brief in Support of Mtn. to Dismiss* at 15, Dkt. 5. Recognizing that application of *Williamson County* would require this Court to remand to state court, the City now reverses course and urges the Court to waive the ripeness requirements in order to reach the other arguments in its Motion to Dismiss. *Def.’s Resp. to Mtn. to Remand* at 11, Dkt. 19. Therefore, the only issue before the Court is whether it

¹ Neither party argues that this case fits into the exception that excuses exhaustion when state procedures are “unavailable or inadequate.” *Williamson County*, 473 U.S. at 197. Without any contrary claim by the parties, the Court finds that Idaho’s inverse condemnation proceedings are constitutionally adequate. *See Union Pac. R.R. Co. v. State of Idaho*, 663 F. Supp. 75, 76 (D. Idaho 1987).

should waive *Williamson County* ripeness requirements.

The Supreme Court has described the *Williamson County* ripeness requirements as “prudential.” *Suitum v. Tahoe Reg’l Planning Agency*, 520 U.S. 725, 733-34 (1997). Application of prudential ripeness turns on the “fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.” *Colwell v. Dep’t of Health & Human Servs.*, 558 F.3d 1112, 1124 (9th Cir. 2009) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)).

Beginning with the first factor, the fitness of the issues for judicial resolution, the Court concludes that Plaintiff’s claims are not fit for resolution. The fact that Plaintiff has had no opportunity to litigate in state court weighs heavily in favor of remand. In *Guggenheim v. City of Goleta*, the Ninth Circuit waived *Williamson County* ripeness requirements because the plaintiff had already litigated the issue in state court, and the Circuit did not see “any value in forcing a second trip on them.” 638 F.3d 1111, 1118 (9th Cir. 2010) (en banc), *cert. denied* --- U.S. ---, 131 S. Ct. 2455 (2011). In other published cases where the Ninth Circuit also waived ripeness requirements, each plaintiff had also significantly litigated their claim in state court. *See, e.g., Adam Bros. Farming, Inc. v. Cnty. of Santa Barbara*, 604 F.3d 1142, 1145-46 (9th Cir. 2010); *McClung v. City of Sumner*, 548 F.3d 1219, 1223 (9th Cir. 2008). Unlike those cases, here remand is necessary to provide Alpine Village an initial opportunity to develop their claim in a state court forum. The strong presumption against removal of a state action to federal court also distinguishes this action and persuades the Court to strictly apply the ripeness

requirements. See *Gaus*, 980 F.2d at 566.

The City's central contention is that its statute of limitations arguments are so clear that remand "will serve no useful purpose." *Def.'s Resp. to Mtn. to Remand* at 1, Dkt. 19. The City attempts to analogize to *Guggenheim*, where the Ninth Circuit was able to dispense with the claim on the merits and so opted to waive prudential ripeness requirements. 638 F.3d at 1118. This Court, though it does not rule on the City's statute of limitations claims at this time, finds they are not so decisive as to justify dispensing with prudential ripeness requirements. The accrual of a federal takings claims turns on the exhaustion of state remedies: "[T]he date of accrual is either (1) the date compensation is denied in state courts, or (2) the date the ordinance is passed if resort to state courts is futile." *Hacienda Valley Mobile Estates v. City of Morgan Hill*, 353 F.3d 651 (9th Cir. 2003) (citing *Levald, Inc. v. City of Palm Desert*, 998 F. 2d 680, 688 (1993)). There is no contention that the exhaustion requirement is futile here. Therefore, Alpine Village's federal claim does not accrue until compensation is denied in state court, and it appears that the statute of limitations has not yet begun to run.²

Turning to the second factor, the Court also finds that remand will impose no

² The City argues that *Hacienda Valley Mobile Estates* and *Levald* apply only "with respect to a federal claim brought first in federal court." *Def.'s Resp. to Mtn. to Remand* at 6, Dkt. 19. But the Ninth Circuit's rationale is at least as strong in the context of a state claim removed to federal court:

"[T]he Fifth Amendment does not proscribe the taking of property; it proscribes taking *without just compensation*." . . . Thus, a plaintiff cannot bring a section 1983 action in federal court until the state denies just compensation. A claim under section 1983 is not ripe-and a cause of action under section 1983 does not accrue-until that point. *Levald*, 998 F.2d at 687 (quoting *Williamson County*, 473 U.S. at 194).

significant hardship on the City. The modest commitment of party and judicial resources at the inception of this action does not justify overlooking ripeness requirements.

Yamagiwa v. City of Half Moon Bay is an instructive contrast to this case. 523 F. Supp. 2d 1036 (N.D. Cal. 2007). There, the district court opted to waive *Williamson County* ripeness requirements when the defendant raised the exhaustion requirement after two full years of litigation, including a trial. *Id.* at 1108. The nascent posture of this case also contrasts with Ninth Circuit decisions waiving ripeness requirements for appellate review of a substantive lower court decision. *See, e.g., Adam Bros. Farming, Inc.*, 604 F.3d at 1148. Because there has not been an initial decision on the merits of this case in any court, remand does not unnecessarily “bounce the case through more rounds of litigation.” *Guggenheim*, 638 F.3d at 1118.

The City argues that remand “would risk misapplication of controlling federal law.” *Def.’s Resp.* at 1, Dkt. 19. Party preference for a federal forum does not constitute a hardship for ripeness purposes. As the Supreme Court has stated: “State courts are fully competent to adjudicate constitutional challenges to local land-use decisions. Indeed, state courts undoubtedly have more experience than federal courts do in resolving the complex factual, technical, and legal questions related to zoning and land-use regulations.” *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 347 (2005). The City’s apprehension that state courts might “depart from controlling Ninth Circuit precedent” is not a valid reason for this Court to waive ripeness requirements. *Def.’s Resp. to Mtn. to Remand* at 5, Dkt. 19.

MEMORANDUM DECISION AND ORDER - 7

B. State Law Claim

This Court may decline to exercise supplemental jurisdiction when it “has dismissed all claims over which it has original jurisdiction.” 28 U.S.C. § 1447(c)(3). Whether to exercise jurisdiction in this circumstance is “purely discretionary.” *Carlsbad Technology, Inc. v. HIF Bio, Inc.*, 129 S. Ct. 1862, 1866 (2009) (citing § 1447(c)). Judicial economy and convenience are best served through concurrent adjudication of all claims in the state tribunal, particularly because the state and federal claim arise out of the same set of facts. Therefore, this Court declines to exercise supplemental jurisdiction over the state law claim.

C. Attorney's Fees

This Court has discretion to require payment of just costs and fees incurred as a result of improper removal. 28 U.S.C. § 1447(c); *see also Martin v. Franklin Capital Corp.*, 546 U.S. 132, 136 (2005). “Absent unusual circumstances, courts may award attorney's fees under § 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal.” *Martin*, 546 U.S. at 141.

Though unconvinced by the City's reasoning, the Court finds that the City possessed an objectively reasonable basis for seeking removal. The City's basis for seeking removal is objectively reasonable because there is a valid federal question on the face of Plaintiff's Complaint. *See Notice of Removal, Exhibit B ¶ 26, Dkt. 1-2*. Further, the lack of subject matter jurisdiction is based on prudential ripeness grounds, which the City reasonably argued that this Court should waive. Accordingly, the Court will deny

Alpine Village's request for attorney fees.

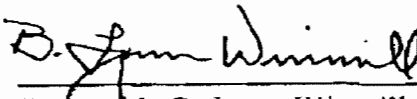
ORDER

IT IS ORDERED:

1. Plaintiff's Motion to Remand (Dkt. 8) is **GRANTED**. This case shall be **REMANDED** to the District Court of the Fourth Judicial District of the State of Idaho.
2. Defendant's Motion to Dismiss (Dkt. 4) is **DENIED** as moot.
3. The hearing scheduled for September 19, 2011 is **VACATED**.



DATED: **August 25, 2011**


Honorable B. Lynn Winmill
Chief U. S. District Judge

ARCHIE N. BANBURY, CLERK
BY: *[Signature]* DEPUTY
AUG 26 2011

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Case No. _____ Inst. No. _____
Filed _____ A.M. _____ P.M.

ALPINE VILLAGE COMPANY,

Plaintiff,

v.

CITY OF MCCALL,

Defendant.

Case No. 1:11-CV-00287-BLW

JUDGMENT

In accordance with the Memorandum Decision and Order entered concurrently herewith,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Judgment be entered and that this case be closed.

DATED: August 25, 2011



B. Lynn Winmill
B. LYNN WINMILL
Chief U.S. District Court Judge

JUDGMENT - 1

Certified to be a true and correct
copy of original filed in my office.
Elizabeth A. Smith, Clerk
United States Courts, District of Idaho
By: *[Signature]* 8/25/2011
Deputy Dated